MCJTC CANTON

1996-1997

POLICE IN-SERVICE TRAINING

Student Reference Materials

Massachusetts Criminal Justice Training Council

at Massasoit Community College
CANTON REGIONAL POLICE ACADEMY
900 Randolph Street
Canton, Massachusetts 02021-1372
Telephone # (508) 588-9100 or (617) 821-2222

In-Service Coordinator:	Lisa Ann Reich	Ext 2051
Administrative Clerk:	Dotty Cashen	Ext 2052
Academy Director:	Marylou Powers	Ext 2050

On behalf of the Massachusetts Criminal Justice Training Council and South Suburban Police Institute, Inc. we would like to welcome you to the third year of In-Service Training held at the Canton Regional Police Academy. If there is anything that the academy staff can do, or have overlooked, please do not hesitate to let us know.

POLICY

1) Classes run from 8:30am-3:30pm, Monday through Friday. Be sure to allot yourself enough time, as traffic on major routes in the area can be congested. In the event you are late, and to be assured credit, you must check in with the Program Coordinator before entering the classroom.
2) Uniforms must be worn all week, including Friday. No jumpsuits, etc.
3) Parking is to the rear of the building in any place other than FACULTY posted signs.
4) Please inform the Program Coordinator if you have court during the week.
5) A microwave and refrigerator are provided for your use should you decide to brown bag your lunch.
6) Please do not talk or disturb the recruits when in session.
7) There is no food or drink allowed in the classroom.
8) There is no smoking in the building; this includes vestibules. Exit to your right outside the classroom and through the double doors to the outside stairwell. (our custodians have placed receptacles for your cigarette disposal)
9) Service weapons are required on Friday for Range Qualification only.
10) Recommended ammunition this year is 200 rounds; required is 150 rounds.
11) To receive a notice of completion, you must attend all classes and score a minimum of 70% on each test. Exam procedure; ten test questions in each subject area at the end of each block of instruction. Twenty-five test questions in CPR & First Responder.
12) To qualify on the range you must score a minimum of 80%. Eye and ear protection is required.
13) Messages will be held until a break. Class will only be interrupted in the event of an emergency.
14) CANCELLATION OF CLASSES DUE TO INCLEMENT WEATHER: When it becomes necessary to cancel because of inclement weather, our policy is that of Massasoit Community College. When MCC is closed, the Academy will also be closed. The following radio stations should be tuned in: WBET-AM Brockton 1460, WCAV-FM 97.7, WPLM-FM Plymouth 99.1, WNBH-AM New Bedford 1340, WBZ-AM Boston 1030, WJDA-AM Quincy 1300, WRKO-AM Boston 680, WEEI-AM Boston 590, and WHDH-TV.

CANTON

FY97 IN-SERVICE TRAINING

Patrolman In-Service Training Program

Time	Monday	Tuesday	Wednesday	Thursday	Friday
8:30am	Motor Vehicle Law Eugenio	C.P.R. Glynn Clifton	Off Duty Issues Brooks/ McCarthy	Critical Incidents Curran	Use of Force Stone
1:00pm	Legal Update Eugenio	First Responder Glynn	Officer Survival/ Oleoresin Capsicum	Juveniles Keating/ Porter	Range Stone Farrell Casey
FY97			DePasquale		

Detective In-Service Training Program

Time	Monday	Tuesday	Wednesday	Thursday	Friday
8:30am	Legal Update Eugenio	C.P.R. Glynn Clifton	Off Duty Issues Brooks	Juveniles Keating/ Porter	Use of Force Stone
1:00pm	Legal Update (including Motor Vehicle Law Update & Mandated Reporters) Eugenio	First Responder Glynn	Officer Survival/ Oleoresin Capsicum	Financial Exploitation and Scams of Elders Scheft	Range Stone Farrell Casey
FY97			DePasquale		

Supervisor In-Service Training Program

Time	Monday	Tuesday	Wednesday	Thursday	Friday
8:30am	Motor Vehicle Law Eugenio	C.P.R. Glynn Clifton	Off Duty Issues Brooks	Juveniles Keating/ Porter	Use of Force Stone
1:00pm	Legal Update Eugenio	First Responder Glynn	Officer Survival/ Oleoresin Capsicum	Supervisory Skills McCarthy	Range Stone Farrell Casey
FY97			DePasquale		

CANTON

In-Service Training

Patrol Officer In-Service Training (Code: ISPB)
Supervisor In-Service Training (Code: ISPS)
Detective In-Service Training (Code: ISPD)

Contact: Lisa Ann Reich
Program Coordinator
Canton Regional Police Academy
900 Randolph Street
Canton, MA 02021-1372
Telephone (508) 588-9100 EXT 2051 or
(617) 821-2222 EXT 2051

Week 1	**Supervisor**	**September 16-20, 1996**
Week 2	**Detective**	**September 23-27, 1996**
Week 3	Patrol Officer	September 30-October 4, 1996
Week 4	Patrol Officer	October 7-11, 1996
Week 5	Patrol Officer	October 28-November 1, 1996
Week 6	**Supervisor**	**November 4-8, 1996**
Week 7	**Detective**	**November 18-22, 1996**
Week 8	Patrol Officer	December 2-6, 1996
Week 9	Patrol Officer	December 9-13, 1996
Week 10	Patrol Officer	December 16-20, 1996
Week 11	Patrol Officer	January 6-10, 1997
Week 12	Patrol Officer	January 13-17, 1997
Week 13	Patrol Officer	January 27-31, 1997
Week 14	Patrol Officer	February 3-7, 1997
Week 15	Patrol Officer	February 10-14, 1997
Week 16	Patrol Officer	February 24-28, 1997
Week 17	Patrol Officer	March 3-7, 1997
Week 18	Patrol Officer	March 10-14, 1997
Week 19	**Supervisor**	**March 24-28, 1997**
Week 20	**Supervisor**	**March 31-April 4, 1997**
Week 21	**Detective**	**April 7-11, 1997**
Week 22	**Supervisor**	**April 14-18, 1997**
Week 23	Patrol Officer	May 5-9, 1997
Week 24	Patrol Officer	May 12-16, 1997
Week 25	Patrol Officer	May 19-23, 1997

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* Enrollment limited to officers who have successfully completed the Full Time Basic Municipal Police Officer Class.

Martha's Vineyard In-Service 10/21-25/96 & 4/28-5/2/97.

What is a Cop?

Cops are human (believe it or not just like the rest of us). They come in both sexes but mostly male. They also come in various sizes. This sometimes depends on whether you are looking for one or trying to hide something. However, they are mostly big.

Cops are found everywhere- on land, on the sea, in the air, on horses, in cars, sometimes in your hair. In spite of the fact that "you can't find one when you want one", they are usually there when it counts most. The best way to get one is to pick up the phone.

Cops deliver lectures, babies, and bad news. They are required to have the wisdom of Solomon, the disposition of a lamb and the muscles of steel and are often accused of having a heart to match. He's the one who rings the doorbell, swallows hard and announces the passing of a loved one; then spends the rest of the day wondering why he ever took such a "crummy" job.

On TV, a cop is an oaf who couldn't find a bull fiddle in a telephone booth. In real life he's expected to find a little blond boy "about so high" in a crowd of a half million people. In fiction, he gets help from private eyes, reporters and "who-dun-it fans." In real life, mostly all he gets from the public is "I didn't see nuttin."

When he serves a summons, he's a monster. If he lets you go, he's a doll. To little kids, he's either a friend or a bogeyman, depending on how the parents feel about it. He works "around the clock", split shifts, Sundays and holiday, and it always kills him when a joker says, "Hey, tomorrow is Election Day. I'm off, let's go fishing" (that's the day he works 20 hours).

A cop is like the little girl, who when she was good, was very, very good, but when she was bad, was horrid. When a cop is good "he's getting paid for it." when he makes a mistake, "he's a grafter, and that goes for the rest of them too." When he shoots a stick-up man he's a hero, except when the stick-up man is "only a kid, anybody coulda seen that."

Lots of them have homes, some of them covered with ivy, but most of them covered with mortgages. If he drives a big car, he's a chiseler; a little car, "who's he kidding?" His credit is good, this is very helpful because his salary isn't. Cops raise lots of kids, most of them belong to other people.

A cop sees more misery, bloodshed, trouble, and sunrises than the average person. Like the postman, cops must also be out in all kinds of weather. His uniform changes with the climate, but his outlook on life remains about the same: mostly a blank, but hoping for a better world.

Cops like days off, vacations, and coffee. They don't like auto horns, family fights, and anonymous letter writers. They have unions, but they can't strike. They must be impartial, courteous, and always remember the slogan "At Your Service." This is sometimes hard, especially when a character reminds him, "I'm a taxpayer, I pay your salary."

Cops get medals for saving lives, stopping runaway horses, and shooting it out with bandits (once in a while his widow gets a medal). But sometimes, the most rewarding moment comes when, after some small kindness to an older person, he feels the warm hand clasp, looks into grateful eyes and hears, "Thank you and God bless you, son."

Conrad S. Jensen

LEGAL UPDATES

Criminal Procedure, Statutory, & Motor Vehicle Law Update

CPS

1996/97 Massachusetts Criminal Procedure, Statutory, & MV Update for Police Officers

Massachusetts Criminal Justice Training Council

In-service training 1997

Executive Director—Howard Lebowitz
Supervisor of Academy Directors—Cliff Keeling

"a comprehensive overview of Massachusetts Criminal Procedure and MV Law for police officers including statutory and case decision updates for 1996 and 1997"

written by
Attorney Patrick M. Rogers
Attorney Robin M. Borges

Layout and Design: Erica Fontaine

P.O. Box 173
Fall River, Massachusetts 02722

tel# 508.644.2116
tel# 508.644.3080
fax# 508.644.2670

Student Handout

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INTRO: The Foundation of Police Criminal Procedure in the Commonwealth of Massachusetts—*by Patrick M. Rogers, esq.*

Introduction to the Foundation

The legal foundation of any police intrusion requires an understanding of the concept of a ***reasonable expectation of privacy.*** If a person has a reasonable expectation of privacy in an area or object, then any police intrusion into that area or object must be reasonable. The standard of reasonableness will depend on whether the police are conducting a stop, a stop and frisk, or whether they are conducting an evidentiary search. Depending on the type of police intrusion, the standard of evidence required will be either reasonable suspicion or probable cause.

A reasonable expectation of privacy will depend on:

(1) whether the individual has exhibited an actual (subjective) expectation of privacy—whether the individual has shown that he seeks to preserve something as private, ***and***
(2) whether the individual's subjective expectation of privacy is one that society is prepared to accept as "reasonable"—whether the individual's expectation, viewed objectively, is justifiable under the circumstances

The Court, in determining whether a defendant's expectation of privacy is one which society could recognize as reasonable, will examine:

(a) the place of the search
(b) the property searched
(c) the precautions taken by the defendant to maintain his privacy

Three Types of Police Intrusion

Once it is ascertained that the defendant has a reasonable expectation of privacy in the area or object subject to the police intrusion, an analysis must be made concerning the type of police intrusion. There are three types of police intrusions that must be remembered:

1) stops/seizures or investigative detentions [these terms are interchangeable with one another; they also mean that a seizure has taken place for constitutional purposes]
2) frisks or cursory pat downs [these terms are interchangeable with one another; they also mean that a search has taken place for constitutional purposes]
3) evidentiary searches

Legal Standards Police Must Use [reasonable suspicion and probable cause]

■**Reasonable Suspicion**
Reasonable suspicion is the legal standard that must exist if police are conducting either of the following:

a) seizing a person for investigative purposes
b) frisking a person reasonably suspected of being armed and dangerous

■**Probable Cause**
Probable cause is the legal standard that must exist if police are conducting either of the following:

a) an arrest of a person
b) a seizure of any evidentiary item that does not fall within the category of a weapon or an object that can be construed as such

Editor's Note: As you read this entire document it will be important to recall this analysis. It can be used in any police situation involving an intrusion into an area where there exists a reasonable expectation of privacy.

The Stop or Investigative Detention [permissible based on reasonable suspicion]

This type of police intrusion is permissible on the standard of reasonable suspicion. Probable cause is not required. If a police officer has reasonable suspicion based on specific and articulable facts to believe that the suspect has, is, or os about to commit a crime, he or she will be empowered to conduct a stop or investigative detention. This standard of information will not ordinarily, in this circumstance, additionally permit police to conduct a frisk. See below.

Frisks or Cursory Pat Downs [permissible based on reasonable suspicion]

This type of police intrusion is also permissible on the standard of reasonable suspicion. Probable cause is not required. If a police officer has reasonable suspicion based on specific and articulable facts to believe that the suspect is unlawfully armed and dangerous, he or she may conduct a pat frisk. The scope of the frisk is strictly limited to weapons or objects that can be used as such. It is important to understand that everyone subjected to a stop is not ordinarily going to be subjected to a frisk. A person stopped for going through a yield sign cannot automatically be subjected to a frisk. Additionally, if police detain an elderly person on reasonable suspicion that he has committed the offense of shoplifting, a frisk can only be performed if, in addition to the justification for the stop, police have additional reasonable suspicion that the shoplifting suspect is unlawfully armed and dangerous. Without this additional information, a pat frisk would be unlawful.

Frisk Must Be For Weapons or Objects Used as Such

The object of the cursory pat down can only be weapons or objects that can be used as such under circumstances where the investigating officer has reasonable suspicion that the individual possessing them is a danger. A frisk on reasonable suspicion cannot be legally supported if it is conducted specifically for items or objects that cannot pose a threat to the officer. That type of frisk would require probable cause.

Did a Seizure Actually Take Place?

This is often a confusing area to law enforcement practitioners. Just because a police officer has a conversation with an individual does not mean that a stop or investigative detention has occurred. Remember, a seizure requires reasonable suspicion. If the officer did not "seize" the subject, then no reasonable suspicion is required. If a police officer simply calls out to a subject walking down the street and engages him or her in conversation, no seizure has occurred. As long as the subject is free to walk away, no constitutional infringement will trigger.—and, as stated earlier, no reasonable suspicion, or any standard of evidentiary justification will be required.

Editor's Note: In other words, police will be free to engage persons in conversation without any legal justification at all. If the person decides to walk away and the officer detains him, even momentarily, the standard of reasonable suspicion must exist. If not, then a constitutional violation has occurred and any evidence discovered as a result will be suppressed.

Evidentiary Search [permissible based on probable cause only]

The above two types of police intrusions are permissible using the standard of reasonable suspicion. This is so because a stop is of brief duration, usually taking place in public and that the object of a frisk is to make sure the suspect cannot access a weapon to assault the police officer or others in the immediate area. The standard of probable cause would be too rigorous for law enforcement to have to meet in these instances. On the other hand, whenever police undertake an evidentiary search of an area or object in which the suspect has a reasonable expectation of privacy, the standard of probable cause is required. Without probable cause, the evidence will be suppressed.

Editor's Note: As an example, if police stop and frisk a suspected drug dealer on reasonable suspicion, a search of a small soft bag discovered inside of a jacket pocket would not be legal. Since a soft bag could not be a weapon, it could not be searched on the standard of reasonable suspicion. It could only be entered by the police if they have probable cause. The type of police intrusion in this instance would not be a weapons frisk, it would be evidentiary in nature, therefore, probable cause would be required.

Frisk-Search Requires Probable Cause

If police frisk a person for evidence that could not conceivably be a dangerous weapon, then the standard of probable

cause must exist to support that frisk-search. The following example is based on the recent case of **Commonwealth v. Alvarado**, 420 Mass. 542 (1995).

Editor's Example: Police conduct a stop of a motor vehicle for a red light violation. At the request of the investigating officer, the operator alights from his vehicle. The operator is then observed placing a small soft brown paper bag into his shirt pocket causing it to create a small bulge. The officer then places his hand on the outer shirt pocket and "pats" the small bulge. Is this permissible? Since there is obviously a reasonable expectation of privacy in the person's shirt, what standard of reasonableness is required to legally support this type of police intrusion? This type of intrusion is clearly a "search" for purposes of constitutional analysis. Additionally, the type of police intrusion here is clearly evidentiary. There is no indication whatsoever that the small soft brown paper bag is either a weapon or that it could conceal a weapon. Therefore, this type of police intrusion, although only a frisk, can only be supported by full probable cause. See **Commonwealth v. Alvarado**, 420 Mass. 542 (1995).

Evidentiary Search; Once Probable Cause Exists—Police Require Either a Warrant, Consent, or Exigent Circumstances—the Three Cornerstones

If police are to conduct an evidentiary search, the standard of probable cause is required. Once police have the requisite probable cause, they then require either a warrant, consent, or exigent circumstances to further justify the intrusion.

Example: Police observe through a living room window that a dwelling house has a large six foot marijuana plant. This obviously creates probable cause. However, does this automatically allow police to seize the plant? What type of police intrusion would it require? Since there is a reasonable expectation of privacy in a dwelling, a certain standard must be met by the police. Would it be reasonable suspicion or probable cause? Since the intrusion would be for evidence, probable cause would be required. Once probable cause has been attained, then police need either a warrant, consent or exigent circumstances to seize the plant. It is also important to understand in this particular example that probable cause to believe that a dwelling house simply contains contraband does not amount to exigent circumstances. There must be a reasonable fear of destruction of the evidence. Therefore, without a reasonable fear of evidence destruction, police must either obtain a warrant or have consent.

Example: On a cold night, undercover police observe a man selling marijuana on a street corner. After conducting a brief surveillance, police additionally observe that the suspect is keeping the stash inside of his large winter jacket. Police walk over to this individual, identify themselves, and conduct a search of his jacket pockets. They discovery a number of one ounce bags of marijuana secreted inside his jacket pockets along with a $500.00 bill. What type of police intrusion was effected? Since there is obviously a reasonable expectation of privacy in the person himself, a certain standard must be met by the police. Would it be reasonable suspicion or probable cause? Since the intrusion is for evidence, probable cause would be required. In this example, police clearly had probable cause based on their first hand observations. Once probable cause exists, then police additionally need to be operating under one of three banners discussed above, either with a warrant, consent, or exigent circumstances, to lawfully search for and seize the evidence. In this example, the search and seizure of the evidence would be permissible because the circumstances would be exigent. See **Commonwealth** v. **Skea**, 18 Mass. App. Ct. 685 (1984).

Example: Police have a surveillance set up in an area notorious for drug trafficking. The area has also been the scene of recent shootings involving narcotics. They observe an unknown male standing in this area simply having a conversation with a female. The female is known to the police as having an arrest record for trafficking in Class B and unlawful possession of a firearm. Police walk over to this male to make an inquiry as to his presence in the area under the circumstances. Police then order this male to "get up against the wall," so they may conduct a pat-frisk. Inside of his zippered jacket pocket, police feel a very soft object consistent with being a small paper bag. They unzipper the pocket and remove the paper bag. Inside of the bag police discover a small amount of cocaine. What type of police intrusion is this? Is it for weapons or for evidence? Since the bag could not be a weapon or an object that could be used as such, the search of the bag could only be evidentiary in nature. What standard is then required? Answer—probable cause. Did the police, in this fact pattern, have probable cause to conduct a search and seizure of this male for evidence? Answer—No. Although a pat and frisk may have been justifiable under the circumstances, the police clearly did not have probable cause to believe that the male possessed any incriminating evidence on his person. The scope of the pat-frisk conducted by the police would not extend into the paper bag because it could not reasonably be construed as a weapon or of holding a weapon. The cocaine would be suppressed. See **Commonwealth v. Clermy**, 421 Mass. 325 (1995).

1997 Criminal Procedure

Stop and Frisk: When Does the Stop Start?

The Stop Starts When the Pursuit Begins

Recently, in **Commonwealth v. Stoute**, 422 Mass. 982 (1996), the Massachusetts Supreme Judicial Court formally announced that for purposes of article 14 of the Massachusetts Declaration of Rights, a police officer must have reasonable suspicion to justify a pursuit. If not, any evidence obtained as a result of it must be suppressed.

Example: While on routine cruiser patrol,two police officers observe a male standing on a street corner late at night. The subject looks up at the police and starts to walk away from the approaching cruiser. The cruiser pulls off to the side of the roadway. The two officers then exit the cruiser and continue to monitor the subject. The subject, still peering back at the police officers, starts to walk faster. The officers start to walk in the direction of the subject. The male subject then starts to walk faster. The police officers also start to walk a bit faster toward the subject. The subject now breaks into a sprint pace down the sidewalk away from the police officers. Both police officers then start to pursue him. After a short foot pursuit, the subject is caught. A frisk of his person reveals a loaded firearm.

Question: Assuming that he is unlicensed to carry in the Commonwealth, is the evidence seized by the police admissible against the subject?

Answer: No. Since police conducted a pursuit without any reasonable suspicion, the seized evidence will be inadmissible in light of the recent decision of **Commonwealth v. Stoute**, 422 Mass. 982 (1996).

Reasonable Suspicion Required Prior to the Initiation of the Pursuit

Because of the decision of **Commonwealth v. Stoute**, 422 Mass. 982 (1996), ***before*** police intiate a pursuit of a subject, they must be able to point to specific and articulable facts for legal justification to support the chase.

Following Subject From a Police Cruiser

In **Commonwealth v. Williams,** 422 Mass. 111 (1996), the Massachusetts Supreme Judicial Court stated that where police observe a person running and they decide to following them in a cruiser to merely observe them, "[no] degree of suspicion, reasonable or otherwise, [is] constitutionally required for the police to commence surveillance."

Sources of Reasonable Suspicion of Criminal Activity

These are the most common sources for reasonable suspicion of criminal activity. They may be helpful for police officers to cite "specific and articulable" facts in their offense reports to help justify a stop and frisk **Terry**-type situation:

1. admissions and confessions
2. real and physical evidence observed
3. person's prior criminal record or reputation
4. furtive gestures or flight
5. knowledge that a crime has been committed
6. visible apprehension at the sight of police officers
7. attempts to avoid contact with the police
8. evasive answers, conflicting stories, refusal to answer
9. area known for criminal activity
10. association with known criminals
11. individual matches description of "wanted" suspect
12. suspicious presence at a late hour in unusual location
13. proximity to the crime scene
14. special training or knowledge of the officer
15. lack of "fit" between suspect and neighborhood
16. time of the day or night
17. immediately verifiable info from an informant
18. activity inappropriate in its setting
19. traffic violations

The Police Encounter

Field Interrogation Observation (FIO)Procedures Not a Seizure

In **Commonwealth v. Thinh Van Cao**, 419 Mass. 383 (1995), the defendant in an armed robbery case was identified by an earlier photograph taken by police during a **Field Interrogation Observation** procedure. Under that procedure, the police question suspicious looking males concerning gang membership. Police simply ask them their identity and their dates of birth. Police make note of their physical descriptions and then take a Polaroid photograph of the suspect after receiving permission. The defendant attempted to suppress the photographic identification of him from a photograph taken from an impermissible police seizure in violation of the Fourth Amendment and article 14 of the Massachusetts Declaration of Rights. The SJC held that since these police actions do not amount to a seizure, no constitutional violation occurred.

In **Commonwealth v. Thinh Van Cao**, 419 Mass. 383 (1995), the photograph from which the victim identified the defendant [Cao] was taken by a Boston police detective pursuant to a police department policy requiring police in Chinatown to conduct **Field Interrogation Observations (FIO)** of young men they suspect may be involved with Asian gangs. Under this **FIO** procedure, the police question suspicious looking Asian males asking them to identify themselves, to give their date of birth and a physical description (including height, weight and tatoos), and to take their photograph with a Polaroid camera. During an **FIO**, the individuals approached by the police officers are free to go and to refuse having their picture taken. The police did not give Cao any reason to believe that he was not free to go, and they asked his permission before taking the picture. Under the totality of the circumstances, a reasonable person would have believed that he was free to leave and to refuse to be photographed. Therefore, the defendant's constitutional rights were not violated.

Editor's Note: Boston police Detective Waiman Lee testified that while on foot patrol in Chinatown, he conducted an **FIO** of the defendant[Cao] and three of his friends, all youths. Lee testified that he conducts **FIOs** when he suspects someone of being a member of an Asian gang. Lee, dressed in full uniform, approached the group as they were walking together in a parking lot and asked them several questions including their names, dates of birth, addresses, and physical descriptions. Lee testified that the youths stopped when he approached them and answered the questions. After he asked the questions Lee performed an outstanding warrant check on the youths. The process of questioning and checking for warrants took no more than 5 minutes. Lee testified that after he had checked for warrants, Detective John Bean came on the scene. At Lee's request, Bean retrieved a Polaroid camera from his car. When Bean returned with the camera he asked the youths, including the defendant, "you don't mind if we take a picture of you, right?," to which the defendant replied, "No, I didn't do anything wrong, go ahead." Lee testified that at no time during these few minutes did the detectives indicate to the group that they were not free to leave. The defendant spoke with his friends during the encounter and appeared to be under no physical distress nor did he indicate that he wanted to leave.

Editor's Note: The Massachusetts Supreme Judicial Court stated that "[a]ll of the information given was recorded by Lee on a small notecard as was his normal practice when conducting FIOs. There was no evidence that Lee ordered the group to answer his questions or otherwise indicated that they could not terminate the encounter. The FIO was conducted in public, while the defendant was walking with friends in a parking lot, not while the defendant was in a confined space or in a car. Lee testified that during the encounter the defendant spoke with his friends and did not appear to be under any physical distress nor did he indicate at any time that he wished to leave. Under these circumstances, we cannot say that a reasonable person would have been sufficiently intimidated so as to feel that he or she could not terminate the encounter and walk away. Therefore, there was no seizure." Lastly, in **Terry v. Ohio,** 392 U.S. 1 (1968), the United States Supreme Court noted that "street encounters between citizens and police officers are incredibly rich in diversity. They range from wholly friendly exchanges of pleasantries or mutually useful information to hostile confrontations of armed men involving arrests, or injuries, or loss of life."

Field Interrogation Observations (FIO) Targeting Specific Racial Groups

In **Commonwealth v. Thinh Van Cao**, 419 Mass. 383 (1995), the defendant argued that race was used as a determinative factor in who the officers conducting FIOs in Chinatown targeted and sought to suppress the **FIO** photograph under the exclusionary rule on the grounds that the **FIO** policy was a "formula for absolute tyranny." On the issue of discrimination, the Massachusetts Supreme Judicial Court stated that "the proper remedy for the defendant's concerns is not the exclusionary rule." **Terry v. Ohio,** 392 U.S. 1, 13-15 (1967) (recognizing that although FIO procedures are a source of conflict between minority youth and police officers, the exclusionary rule is not an effective method of discouraging considerations of race in police work).

Written Policy Guidelines Should Be Promulgated by Departments Concerning FIOs

In **Commonwealth v. Thinh Van Cao**, 419 Mass. 383 (1995), the Massachusetts Supreme Judicial Court stated that "[w]e suggest that the better practice would be for officers conducting **FIOs** to inform the individuals approached that the encounter is consensual and that they are free to leave at any time. We also suggest that the police department develop clear guidelines for the application of the FIO procedure so that officers are given guidance as to the permissible scope of such encounters."

Stop and Frisk: The "Frisk-Search"

Frisk of Bulge Containing Plastic Glassine Bag Requires Probable Cause—The "Frisk-Search"

In **Commonwealth v. Alvarado**, 420 Mass. 542 (1995), police effected a stop of the defendant as he was traveling in his motor vehicle on Route 495 with a passenger. Police stopped this vehicle based "on the peculiar maneuverings of the automobile and the extremely slow speed at which it was traveling." After the vehicle stopped, the officer approached the driver's side and instructed the operator to drive off the highway into a nearby rest area. While speaking to the operator, the officer shone his flashlight into the interior and observed the passenger grasping an object in a closed fist while attempting to place it down the front of his pants. The object appeared to be a clear plastic glassine bag commonly used in the drug trade. Once in the rest area, the officer approached the passenger's side and instructed the passenger to step from the vehicle. The officer then asked him what he had placed down the front of his pants. He denied placing anything into his pants. The officer then requested a license from the operator. Additionally, he asked the operator for his social security number. The operator could not recall it. The officer then again asked the passenger what he placed into his pants. The passenger stated, "Nothing," and without any instruction from the officer, assumed a "spread eagle" position against the suspect vehicle. The officer then patted the front of the passenger's pants and felt a bulge. Since the officer had earlier observed that the item placed down the front of the defendant's pants was a small plastic bag, a frisk of that area would not be permissible for weapons or objects that could be used as such. The police intrusion here could only qualify as evidentiary in nature. Since a "pat frisk" is a search for constitutional analysis, the SJC stated that for the "pat frisk" of the bulge to be permissible in this case, probable cause was required.

Editor's Note: The SJC held that the officer's observation of the glassine bag during the initial stop combined with the passenger placing the bag into the front of his pants did not rise to the level of probable cause to arrest or search the passenger.

Stop and Frisk: A Division of Doctrines

High Crime Rate Area Alone Not Enough to Effect a Stop

The fact that there has been criminal activity in the area or that it is a high crime area may justify a brief threshold inquiry along with other factors. But the fact, standing alone, that the defendant was in a neighborhood frequented by drug users is not a basis for concluding that the defendant himself was engaged in criminal conduct and therefore, a threshold inquiry was not warranted. **Brown v. Texas**, 443 U.S. 47 (1979). In **Commonwealth v. Wooden**, 13 Mass. App. Ct. 417 (1982), the Court held that a gesture of stuffing something into one's pocket, *by itself,* did not justify the stop.

Editor's Note: In **Commonwealth v. Cheek**, 413 Mass. 492 (1992), the Court stated that just because police stop someone in a "high crime area" will not be persuasive. That factor contributes nothing to the police officers' ability to distinguish defendants from any other. Where there is a report of a crime in a neighborhood which police consider to be a "high crime area." law enforcement officials may not conduct a broad sweep of that neighborhood stopping individuals who happen to live in the area and be about, hoping to apprehend a suspect. To permit police investigative stops in this manner would be to encourage unduly intrusive police practices. The problems that may face a particular area of the community or any other similar "high crime area" will not be resolved any more readily by excluding the individuals who live there from the protections afforded by our Constitution.

Race and Jacket Match Not Enough to Effect Stop

In **Commonwealth v. Cheek**, 413 Mass. 492 (1992), Boston police officers at approximately 11:20 P.M., received

the following bulletin over their police radio:

> **"16 Ruthven Street, the second floor, stab victim stabbed to the back supposed to be conscious. "For a suspect we have a black male with a black 3/4 length goose known as Angelo of the Humboldt group. We'll get further info later."**

Following receipt of the bulletin, the officers began to search the Grove Hall area of Boston for a suspect in the stabbing. Subsequently, the officers observed a black male (the defendant) walking on a street approximately one-half mile from the scene of the reported stabbing. The defendant was wearing a dark-colored three-quarter length goose-down jacket. The police officers then effected a stop of the defendant, and asked him his name, to which he responded "Zan" or "Ann." His response was not clear to the officers because he had his coat zippered up over his mouth. The defendant's hands were in his coat pocket. A second officer frisked the defendant and retrieved a .38 caliber handgun from his front coat pocket. Police then placed the defendant under arrest after he failed to produce a license to carry the gun. A subsequent booking search of the defendant revealed seventeen plastic bags of marijuana.

Editor's Note: The SJC held that these factors could not have provided the officers with reasonable suspicion that the defendant was the perpetrator of the reported stabbing. Significantly, the description of the suspect as a "black male with a black 3/4 length goose" could have fit a large number of men who reside in the Grove Hall section of Roxbury, a predominantly black neighborhood of the city. The officers possessed no additional physical description of the suspect that would have distinguished the defendant from any other black male in the area such as the suspect's height and weight, whether he had facial hair, unique markings on his face or clothes, or other identifying characteristics. **That the jacket matched was not enough to single him out.** Moreover, the Commonwealth presented no evidence to establish that a "3/4 length goose" jacket, the sole distinctive physical characteristic of the garment, was somehow unusual or, at least, uncommon as an outer garment worn on a cold fall night. Although the officers properly may consider that the defendant was one-half mile from the scene of the reported stabbing, taken together with the other facts in this case, it was not enough to support a reasonable suspicion. That the defendant was walking in a residential area before midnight one-half mile from the scene of the crime does not make up for the lack of detail in the radio description, as it did not help to single him out from any other black male in the area. There was no evidence that the defendant had been fleeing the scene of the crime or that he, or any other person, was engaged in any suspected criminal activity.

Close Proximity to Crime Scene Coupled With Furtive Movements Justification for Frisk

In **Commonwealth v. Mercado**, 422 Mass. 367 (1996), police received a dispatch concerning gunfire involving three "Hispanic males." When the police arrived at the scene, they observed the victim bleeding profusely. A witness then told police that he had observed some unusual activity at a shoe store nearby The witness stated that he observed a shirtless Hispanic or black male wearing olive green pants pushing people out of his way in an apparent attempt to reach the cash register. He had three or four fifty dollar bills in his hands and said that he wanted to buy an article. The man appeared very agitated. The officer then observed an Hispanic male come out of a vestibule and then go back in. The office then observed a second Hispanic male make these same movements. The defendant was wearing plaid pants with a long Miami Hurricane shirt extending over the top, and a baseball cap. The officer patted him down and discovered a 9mm. in his waistband. The Court held that the officer had reasonable suspicion to conduct a stop and frisk under the circumstances. The report narrowed the range of possible suspects to males of Hispaic decent who were in the particular vicinity of the incident. Additionally, a witness further narrowed the range of suspects to males of Hispanic decent. then present in the area of the store. That information, coupled with the furtive behavior of the defendant and his companion was sufficient for the officer to form a reasonably suspicion to effect a stop and frisk under the circumstances. The seizure of the weapon was permissible.

Difference Between Cheek and Mercado

In this case, unlike**Commonwealth v. Cheek**, 413 Mass. 492 (1992), the information in possession of the officer allowed him to distinguish the defendant and his companion from all other persons in the vicinity.

Running Down Street at Sprint Pace

In **Commonwealth v. Williams,** 422 Mass. 111 (1996), police observed two black males running at "sprint pace" down Washington street in Boston. The officers observed that bystanders were turning and pointing at them. One of the officers observed the defendant pull a white shirt over his head and discard it. Police also noticed that this man was sweating and

had a strained expression on his face. A bystander then walked over to the officers and gave them a beeper and told them that one of the running males dropped it. The officers then followed these running males with the police cruiser. The defendant then ran behind a house. The officers exited their cruiser to investigate. They then observed that the defendant was covered with blood. The defendant then attempted to scale a chain link fence. One of the officers ordered the defendant to stop. The officer unholstered his weapon and followed the defendant who fled behind another house. The officer ordered him to the ground at gunpoint. The defendant then stated that he had been shot, but police did not observe any wounds. While handcuffing the defendant, the officers received a radio broadcast reporting a confirmed shooting in the immediate area. The description aired over the radio mathced the individual now in custody. The Court held that the police had reasonable suspicion to conduct a stop and frisk of the subject under the circumstances.

Circumstantial Proof of Unlawful Carrying

In **Commonwealth v. Williams,** 422 Mass. 111 (1996), the defendant was observed by witnesses fleeing from a building immediately after shots were fired. The witnesses stated and later testified that they observed the defendant carrying a gun. However, when the defendant was apprehended, no gun was discovered. The Court stated that "the jury could properly consider eyewitness testimony that the defendant had a firearm in his possession, even in the absence of the recovery of such a firearm." Additionally, the Court stated that "[i]t is sufficient that a gun was fired and the defendant was seen fleeing the scene within seconds of the gunshots. A conviction may be properly based entirely on circumstantial evidence so long as the evidence establishes the defendant's guilt beyond a reasonable doubt."

Editor's Note: Another interesting case concerning circumstantial proof is **Commonwealth v. Dawson**, 399 Mass. 465 (1987). In **Dawson**, a case concerning controlled substances, the SJC stated that "[p]roof that a substance is a particular drug need not be made by chemical analysis and may be made by circumstantial evidence." Nor is the testimony of a qualified chemist required. Additionally, the SJC stated that "the great weight of authority in this country permits [] an experienced user of a controlled substance to testify that a substance that he ***saw and used*** was a particular drug." Lastly, they stated that "[w]e suspect it would be a rare case in which a witness's statement that a particular substance ***looked*** like a controlled substance would ***alone*** be sufficient to support a conviction."

Stop and Frisk: Simultaneous Discovery of Evidence During Frisk

Contraband Simultaneously Uncovered During Frisk for Weapons Permissible

In **Commonwealth v. Johnson**, 413 Mass. 598 (1992), the SJC upheld a frisk which produced a plastic bag containing a lump of white powder from the defendant's pants after he was seen attempting to hide something there. In **Johnson**, police operating an unmarked police cruiser were almost hit by an individual operating his motor vehicle at a high rate of speed. After a high speed chase, the defendant was subsequently forced off the road by police. As the police officers ran toward the defendant's vehicle, they saw the defendant placing something inside the waistband of his pants. The defendant was then ordered at gunpoint to "freeze," and was subsequently pulled from his automobile. A police officer then discovered inside of the defendant's pants a plastic bag containing a lump of white powder and six small paper folds. A police officer is not going to be held to the standard of whether he was able to ascertain, under threatening circumstances, whether a bulge or container was a weapon or not. "[I]t was necessary for the protection of [the officer] and others to take swift measures to discover the true facts and neutralize the threat of harm if it materialized." Given the circumstances faced by the officers in this case, they were warranted for their own protection in finding out what the defendant had concealed inside his pants. Police officers are not required to gamble with their personal safety. ***Any contraband or other evidence of a crime discovered during a lawful frisk will be admissible under the doctrine of plain view.***

Editor's Note: The SJC permitted the police to enter the defendant's pants as a frisk under the circumstances to *seize* the items being secreted "to discover the true facts and neutralize the threat of harm if it materialized." Once the bag was removed from the defendant's pants the cocaine was observed by the police officers in plain view. The SJC is not going to require the police to make split second legal tactical decisions concerning the dangerousness of an object or container concealed on the body of a suspect under the circumstances. On the other hand, if the police were unable to see into the plastic bag after they seized it from the defendant's groin, coupled with the fact that it was incapable of being a weapon or holding a weapon, further inspection of the plastic bag could not be justified without probable cause.

Contraband Simultaneously Uncovered During Frisk for Weapons of Jacket Taken From Suspect

In **Commonwealth v. Rivera**, 33 Mass. App. Ct. 311 (1992), Marlborough police pulled over a motor vehicle for a speeding violation. When the officer turned on his dome lights to effect the stop, he observed the passenger of the motor vehicle look back at the police cruiser and then bend forward as if he were putting something on the floor. There were two additional passengers in the back seat. Subsequent to the stop, the operator told the officer that he did not have his license with him. The officer then observed an aluminum baseball bat sticking out from the seat between the passenger's legs. Remembering that only two weeks earlier a police officer in Lawrence had been beaten to death with an aluminum baseball bat during a routine traffic stop, the officer became concerned for his safety and called for a backup. The officer conducted a pat frisk of the front passenger. Finding nothing suggesting a weapon, the officer conducted a frisk of a passenger seated in the rear. This passenger was clutching a "boombox" in his lap. Although he was told to place both of his hands on the trunk of the vehicle, he kept taking one of his hands off the trunk and grabbed at his jacket. The officer then conducted a frisk of this passenger and felt what he thought was a weapon in his jacket. Because the officer was unable to locate the suspected weapon in any pocket, he removed the jacket from the passenger and placed it on the bumper of the police cruiser. By this time, the backup officer arrived. That officer then searched the jacket and found a buck knife and a large number of packets containing heroin between the lining and the outer shell of the jacket. The Court held that the frisk was permissible under the circumstances, and, additionally, upheld the seizure of the heroin packets from the defendant's jacket since they were discovered in the course of a lawful frisk for weapons.

Conducting a Seizure Based on an Anonymous Tipster

Editor's Note: This area continues to cause a great deal of confusion with police officers due to the complexity of establishing reasonableness from an anonymous informant or anonymous tipster. Therefore, I am repeating this particular topic in the in-service materials for 1997 together with additional cases to assist police officers with this difficult area. In **Commonwealth v. Lyons,** 409 Mass. 16 (1990), the Massachusetts Supreme Judicial Court held that when police act pursuant to an anonymous tip, the standard of reasonable suspicion will be measured against whether there is any indicia of reliability and basis of the tipster's knowledge. It is the establishment of these prongs, often under circumstances requiring an immediate response, which creates uncertainty with police officers and causes frustration when they later ascertain through a motion to suppress that what they did mandated suppression.

Lack of Informant's Reliability and Basis of Knowledge

In **Commonwealth v. Lyons,** 409 Mass. 16 (1990), police received an anonymous telephone call stating that two white males, one of whom was named Wayne, had just purchased narcotics in Chelsea and would be heading for Bridgton, Maine. The caller stated that they would be driving in a silver Hyundai automobile with Maine registration 440-44T. A police surveillance was then set up. Approximately 45 minutes after the call, police observed the auto. Police stopped the vehicle. The operator was Wayne Lyons. The identity of the operator was learned **after** the stop. Police then observed cocaine in plain view and both occupants were subsequently arrested. ***The evidence was ordered suppressed.***

The Massachusetts Supreme Judicial Court held that the Commonwealth shall adhere to a reasonable suspicion standard using both **reliability** and the **basis of knowledge** as factors in assessing an informant's information when it leads police into conducting a stop or a stop and frisk.

Applying this approach to the facts in Lyons, the Court stated that:

> "the police ***did not have*** sufficient articulable facts for the investigatory stop. The tip provided no information regarding either the basis of the informant's knowledge or his reliability. Furthermore, the quantity and quality of the details corroborated by the police were simply insufficient to establish any degree of suspicion that could be deemed reasonable. The police officer was able to verify only the description of the automobile, the direction in which it was headed, and the race and gender of the occupants before making the stop. These details do not reveal any special familiarity with the defendant's affairs that might substitute for explicit information about the basis of the caller's knowledge. Indeed another driver equipped with a car telephone could have provided the same details. Likewise, the informant's reliability was only slightly enhanced by this corroboration because the police verified no predictive details that were not easily obtainable by an uninformed bystander. The corroboration went only to obvious details. [T]hese defendants displayed no suspicious behavior that might have heightened police concern."

Editor's Note: If police ran the registration plate prior to the stop and discovered that the owner's name was Wayne, this information would go toward establishing the reliability of the caller. Additionally, if the caller had imparted future predictive details concerning a particular exit ramp the vehicle eventually turned off of, this would also go to establishing the reliability prong. The basis of knowledge prong can be satisfied where the facts indicate that the tipster observed the evidence.

Anonymous Tip Concerning the Carrying a Concealed Weapon Not Reasonable Suspicion

In **Commonwealth v. Alverado**, (1996), an anonymous caller to police reported seeing "several Hispanic subjects" in a blue automobile in the driveway of "138 Jackson street." The anonymous caller further reported to the police that he or she saw a gun inside the vehicle and that it was wrapped in a towel. When police arrived at 138 Jackson street, they immediately observed a blue vehicle with six Hispanic or Black people sitting in it. The car was starting to back out of the driveway. The police officer parked his cruiser directly behind the suspect vehicle and turned on his dome lights. Police told the operator that they were investigating a complaint concerning a firearm located in a blue car. The defendant-operator replied that he did not have a firearm in the car and invited the police to search the vehicle. Police then discovered a .22 caliber firearm wrapped in a towel located in the glove compartment. The operator was then arrested for unlawfully carrying a firearm.

The question presented in **Alverado** was whether the presence of a handgun wrapped in a towel provides any reasonable basis for suspecting the occurrence of past, present, or future criminal activity. Carrying a firearm without a license (or other authorization) is a crime punishable by c. 269, § 10 (a). The Massachusetts Supreme Judicial Court held in **Commonwealth v. Couture**, 407 Mass. 178 (1990), that, under the Fourth Amendment, "[t]he mere possession of a handgun was not sufficient to give rise to a reasonable suspicion that the defendant was illegally carrying that gun."

Editor's Note: The Massachusetts Supreme Judicial Court stated that "carrying a weapon concealed in a towel, a bag, or a knapsack, for example, however, is not a crime in this State. The suspected crime in such circumstances can only be the carrying of an unlicensed weapon, ***because carrying a concealed weapon is not, standing alone, an indication that criminal conduct has occurred or is contemplated."***

Satisfaction of Basis of Knowledge But Lack of Reliability Insufficient to Trigger Reasonable Suspicion

In **Commonwealth v. Alverado**, (1996), the information from the anonymous informant would warrant a reasonable suspicion that the defendant had committed, was committing, or was going to commit a crime ***only if the informant's tip were shown to be reliable.*** Reliability of an anonymous tip must be based on the informant's reliability and on a demonstration of the basis of the informant's knowledge. The basis of the informant's knowledge appeared within the tip itself, in which the caller stated that he or she had ***seen*** several "Hispanic subjects" in a blue car in the driveway at 138 Jackson Street and had seen a handgun wrapped in a towel in the vehicle. However, the information regarding the location and description of the vehicle did not establish the informant's reliability because they amounted to innocent details.

Editor's Note: In **Commonwealth v. Alverado**, (1996), the Court stated that "these facts are less persuasive than the facts in **Commonwealth v. Lyons**, 409 Mass. 16 (1990), in which this court held that information in an informant's tip was not sufficiently corroborated to warrant an investigatory stop. In the **Lyons** case, the State police received an anonymous telephone call stating that two white males had just purchased narcotics in Chelsea and would be heading for Bridgton, Maine, in a silver Hyundai automobile with a Maine registration 440-44T. Less than one hour later, a State trooper saw the vehicle, occupied by two white males, and stopped it. He saw in the vehicle what appeared to be cocaine and drug-related items. This court held that the evidence seized should be suppressed because neither the basis of the informant's knowledge nor his reliability were established by the tip and such details as were corroborated by the police. The police confirmed the detailed description of the vehicle, the direction in which it was headed, and the race and sex of its occupants. The court concluded that: "the informant's reliability was only slightly enhanced by this corroboration because the police verified no predictive details that were not easily obtainable by an uninformed bystander. The corroboration went only to obvious details, not nonobvious details. Significantly, these defendants displayed no suspicious behavior that might have heightened police concern. Anyone can telephone the police for any reason. Thus, some specificity of nonobvious facts which show familiarity with the suspect or specific facts which predict behavior is central to reasonable suspicion. By using objective criteria, the risk of arbitrary action and abusive practices by police is diminished."

Editor's Note: In **Commonwealth v. Alverado**, (1996), the Court stated that "there was no suggestion of threats of violence, acts of violence, impending criminal activity, or concern for public safety. Our cases have not yet declared reasonable suspicion warranted simply on a report of gun possession just because this country has problems with the unlawful use of guns." The Massachusetts Supreme Judicial Court concluded that reasonable suspicion justifying an investigatory stop cannot be gounded on an anonymous tip concerning a concealed weapon made by a person whose reliability is not established where there is no indication (in the tip or otherwise) of a threat to anyone's physical well being ***or*** of the commission of a crime (other than the possibility of the possession of an unlicensed weapon).

Failure to Establish Basis and Reliability of the Information

Recently, in **Commonwealth v. Cheek**, 413 Mass. 492 (1992), police were in search of a stabbing suspect. The police officers received the following information over their police radio : "[f]or a suspect we have a black male with a black 3/4 length goose jacket—known as Angelo of the Humblt group. We'll get further info later." Following receipt of this bulletin, police observed a black male one-half mile from the scene of the reported stabbing. He was wearing a dark-colored three-quarter length goose-down jacket. The police conducted a stop of the defendant and asked him his name, to which he gave an unclear response. He had his coat zippered up over his mouth. The defendant's hands were in his coat pockets. Police frisked the defendant and retrieved a .38 caliber handgun. Since the defendant did not have a license to carry, he was promptly arrested. Was the stop lawful? Did police have enough "reasonable suspicion" to support their actions in effecting the stop and the ensuing frisk? [**Editor's Note:** This sought of information is dispatched to police officers nightly. Officers act on this level of information in many many instances. Is it legal? No.] The Court held that the stop was unlawful. They stated that there was no evidence as to the source of the information on which the radio call was based. The police officers did not possess sufficient and articulable facts to establish a reasonable suspicion that the defendant had committed the crime. That the jacket matched was not enough to single him out.

[**Editor's Note**: Police dispatchers must be trained to obtain as much information as possible from anonymous callers. Descriptions and whereabouts often are not enough. Predictive details will always be helpful to police. This should be made commonplace to all police dispatchers.]

Police Reliance on Radio Broadcast From Headquarters

Where the police rely on a police radio broadcast from headquarters to conduct an investigative detention, the Commonwealth must present evidence to establish its indicia of reliability. Therefore, if the defendant's attorney files a motion to suppress the stop, the prosecution must present evidence at the hearing on the suppression motion on the factual basis for the police radio broadcast in order to establish its reliability. See **Commonwealth v. Cheek**, 413 Mass. 492 (1992).

Police Reliance on Computer Communique From Another Police Agency

In **Commonwealth v. Willis**, 415 Mass. 814 (1993), the Flint, Michigan police sent a teletype communication to the Boston police department. It was based on information furnished to the Flint, Michigan police department by an undisclosed informant. The substance of the communication was that Marco Willis, a black male, five feet ten inches tall, with short hair, last seen wearing a blue jean jacket and pants and black tennis shoes, should be on a Greyhound bus arriving in Boston at approximately 6:50 P.M. He should be carrying a blue and white pillowcase with stripes and no other luggage. Willis was said to be armed with a thirty-eight caliber handgun, taken from his grandfather's house, along with five live rounds. The communication purported to give the gun's serial number and the name of the person to whom the gun was registered. It asked that, if Willis were apprehended, the weapon be confiscated and the Flint police advised. At 4 P.M. that same day, Sergeant Richard Famolare of the Boston police telephoned the Flint police department to verify the information. The officer who had sent the teletype message had gone home for the day. Famolare obtained no further information from Flint. At roll call that afternoon, Famolare learned that Officer William Reynolds had arrested Willis in 1991 for armed robbery. In addition, Reynolds had arrested Willis twice for outstanding default warrants. Famolare, Reynolds, and two other officers went to the Greyhound bus terminal in plain clothes but with their badges visible. When Willis got off the bus carrying a striped pillowcase, Famolare and two officers, *with their guns drawn*, followed Willis. Reynolds went through the bus terminal and confronted Willis from the opposite direction in a driveway down which Willis was walking. No other people were in the driveway. Reynolds, with his gun out and his badge visible, called, "Marco, police, take your hand out of your right pocket." Willis looked at Reynolds and then looked back at the other officers. He removed his hand from his pocket and raised his hands. One of the officers pushed Willis's arms all the way up above his head, and Famolare removed a gun from Willis's pants. Willis volunteered that he had taken the gun for his own protection.

Editor's Note: Before the stop imposed by the Boston police department can be lawful, police must first satisfy the two-pronged test created in **Commonwealth v. Lyons,** 409 Mass. 16 (1990). Independent police corroboration may make up for deficiencies in one or both of these factors.

The SJC held that the police properly conducted a stop and frisk of the defendant. The SJC stated that the teletype message itself went a long way toward showing the informant's **basis of knowledge** by providing detail concerning the pillowcase, the serial number of the gun, the name of the registered owner, and the fact that the gun was taken from the house of the defendant's grandfather. When the defendant, known to the Boston police, got off the bus, *as predicted in the teletype message,* carrying a distinctively striped pillowcase, the information sent from Michigan was significantly corroborated, particularly, and rather conclusively, as to the soundness of the informant's basis of knowledge. Although the teletype message told nothing about the **credibility** of the informant or about the **reliability** of the information, the corroboration of portions of the teletype information by the police who met the bus makes a sufficient but "less rigorous showing" that the information was reliable and thus warranted a reasonable suspicion that the defendant was carrying a stolen gun which might be loaded.

Police Broadcast of "Man Waving a Gun" Not Justifying a Protective Frisk

In **Commonwealth v. Berment,** 39 Mass. App. Ct. 522 (1995), the Court held that a police dispatch of a "man waving a gun," based on an anonymous caller, did not justify a protective frisk of the defendant. At approximately 3 a.m., a police officer on cruiser patrol received a dispatch about "a man waving a gun" at 11 Mount Pleasant Avenue in the Roxbury section of Boston. The radio call did not include the identity of the caller, nor did the call include a description of the man who was "waving the gun." The only detail given was the address of the alleged activity. When the police arrived at 11 Mount Pleasant Avenue, they saw, in an adjacent lot, three men, one woman, and a motor vehicle. One of the men was sitting in the vehicle on the passenger side. The others were standing around the vehicle. The officer did not see any criminal activity. There was no shouting or threats, and no one tried to run upon the arrival of the officer. The four individual were just talking. No one was waving a gun. The officer was familiar with the area. He had made a total of six arrests for drug offenses, none for guns. The officer then forcibly detained the defendant and conducted a pat frisk. The frisk revealed a handgun and live ammunition. The Court suppressed the evidence. The Court stated that "where the police rely on a radio call to conduct an investigatory stop, the Commonwealth must present evidence at the hearing on the motion to suppress on the factual basis for the police radio call to establish its indicia of reliability. There was no evidence regarding the identity of the caller, the circumstances of the call, or the identity or description of the "man waving a gun." The fact that four people were gathered around a motor vehicle at three o'clock in the morning "just talking" does not point to criminal activity.

Training Police Dispatchers Handling Calls from Anonymous Persons

Often police dispatch will receive a call from someone who wants to report a crime but who also wants to remain anonymous. It is important then for the police dispatcher to receive as much information as possible from the caller. Recently, the Courts in Massachusetts have been requiring police to measure the information that they have received from anonymous callers up against a "two pronged test" of reasonable suspicion. This new standard was created by the Massachusetts Supreme Judicial Court in **Commonwealth v. Lyons,** 409 Mass 16 (1990). This test is made up of the reliability of the caller **and** of the basis of knowledge of the caller. In **Lyons,** the Court stated that whenever police effect a stop of a person **or** a motor vehicle, it must be based on both the reliability and the basis of the caller's knowledge. If either one of these prongs is lacking, independent police corroboration may be used as a substitute. Consider the following:

Let's say that a Fall River police dispatcher receives a call from someone desiring to remain anonymous. The caller states that a red 1996 Jaguar is operating east on route 6, Mass. Reg—123456 and that it contains a large amount of cocaine inside the passenger compartment. The caller further states that "they're on their way to New Bedford to score." At this point what amount of information do the Fall River Police Department have? Suppose a surveillance is set up and the suspect vehicle is observed about 30 minutes later—do police have enough to effect a stop of this vehicle? According to the **Lyons** decision, a seizure of this vehicle would not be lawful. Why? Let's look at the facts. The only information that the Fall River Police Department received is that an unidentified person stated that a particular motor vehicle contains contraband. This amount of information will not justify a stop of either a motor vehicle or of a person. Remember what the Court stated in **Lyons,** that someone with a car phone could have made such a call. Information of this quality is broadcasted to police cruisers by police dispatchers all the time. What is required then? Perhaps police dispatchers could extract additional information from the caller relative to [more precisely] where the vehicle [or person] is going. If the caller is able to provide where the vehicle [or person] is going, that information itself would satisfy both the basis of knowledge prong and the reliability prong in

that the caller must have had an inside track of what's going on. In addition, by being able to predict where the vehicle [or person] is headed, it not only lends a personal basis to the caller's knowledge, it also demonstrates a high degree of reliability of the truthfulness of what was originally told to the police dispatcher. [Of course, the direction of a vehicle alone would not be enough to verify that the caller knew where the vehicle would be headed—what would be required is perhaps a moving surveillance to see if the vehicle in fact stopped in the city of New Bedford.] Without information of this sought, the Court will hold such a stop unlawful, in much the same way as the Court did in **Lyons.**

Proportionality of Force During Terry Frisk

Handcuffing a "Terry" Suspect is Not Automatically an Arrest

In **Commonwealth v. Pandolfino**, 33 Mass. App. Ct. 96 (1992), review denied 413 Mass. 1106 (1992), the Massachusetts Appellate Court stated that handcuffing of a defendant will not automatically trigger a de facto arrest. In **Pandolfino**, the defendant was suspected of carjacking. Another Massachusetts case is **Commonwealth v. Andrews**, 34 Mass. App. Ct. 324 (1993), where the Massachusetts Appellate Court stated that the handcuffing of an armed robbery suspect out of concern for police safety did not require probable cause. As long as the police were operating within the orbit of "reasonable suspicion" their actions would be justified under the circumstances.

Handcuffing Occupants of MV and Ordering Them to the Ground on Reasonable Suspicion

Recently, in **Commonwealth v. Varnum,** 39 Mass. App. Ct. 571 (1995), the Court permitted police to handcuff three occupants of a motor vehicle and order them to the ground at gunpoint where police had reasonable suspicion that they were involved in a burglary and that the vehicle might contain stolen property including a shotgun. In Varnum, there was a passage of only a few hours between the reported crime and the stop. The Court stated that "[r]easonable precautions in effecting a Terry stop may include using handcuffs and forcing a defendant to lie on the ground." The actions of the police did not convert the circumstances into an arrest.

Permissibility of Taking Photographs and Fingerprints During Terry Stop

In **Hayes v. Florida**, 105 S.Ct. 1643 (1985), the United States Supreme Court held that where police officers initiate a stop of an individual based on specific and articulable facts that he was the perpetrator of a rape, photographs and fingerprints may be taken to further the police investigation, as long as the process is undertaken by the police with reasonable dispatch. Such investigatory measures do not violate the Fourth Amendment. *Probable cause or a warrant is not required.* Other personal characteristics routinely exposed which may be "seized" include a voice exemplar under **United States v. Dionisio**, 410 U.S. 1 (1973), a handwriting exemplar under **United States v. Mara**, 410 U.S. 19 (1973), and footsole impressions under **United States v. Ferri**, 778 F.2d 985 (3rd. Cir. 1985).

Terry Stop Based on a "Wanted Poster"—Police Issued Bulletin

In **United States v. Hensley**, 469 U.S. 221 (1985), the Supreme Court addressed the question whether a police officer or police department may make a **Terry** stop in reliance on a "wanted flyer" issued by a neighboring police agency indicating that the defendant was suspected of a crime. The Court upheld the stop provided that "the police who issued the flyer or bulletin possessed a reasonable suspicion justifying a stop." This requirement is equally applicable where information is transmitted between officers by radio rather than by a wanted flyer.

Length of the Investigative Detention; How Long is Too Long?

The United States Supreme Court and the Massachusetts Supreme Court have never ruled definitively on this subject. Each set of facts must be examined on a case-by-case basis. In **United States v. Sharpe**, 407 U.S. 675 (1985), the Court stated that there is no fixed time allowed and that it depends upon the purpose to be served by the stop and the time reasonably needed to carry it out. In deciding the permissible duration of a **Terry** investigative detention, *the court will look to the following issues:*

(a) the diligence with which the police pursue the investigation
(b) does the police investigative detention confirm or dispel their suspicions, and
(c) to what extent the suspect's actions contribute to any unnecessary delay

The following cases will be instructive when determining the proper length of an investigative detention:

(a) United States v. Richards, 500 F.2d 1050 (9th Cir. 1974), where a one hour detention was reasonable where the suspects offered implausible explanations of their activity which agents attempted to verify
(b) United States v. Hardy, 855 F.2d 753 (11th Cir. 1988), where fifty minutes had past while police secured a drug sniffing dog [in **Hardy**, the police could not have anticipated the use of the drug sniffing dog]
(c) United States v. Quinn, 815 F.2d 153 (1st Cir. 1987), where twenty to twenty-five minutes elapsed while police acted diligently to confirm their suspicions
(d) State v. Foster, 535 A.2d 393 (Conn.App.Ct. 1988), where one full hour elapsed while police sought to locate the owner of a burglarized vehicle at 4:50 a.m.
(e) Commonwealth v. Tosi, 14 Mass.App.Ct. 1029 (1982), where twenty to thirty minutes elapsed while a license and registration check culminated into a showup identification for stolen property
(f) Commonwealth v. Sanderson, 393 Mass. 761 (1986), where forty minutes detention to await the arrival of drug sniffing dog was unreasonable.
(g) United States v. Sharpe, 407 U.S. 675 (1985), where the suspect and his vehicle were detained for 20 minutes while the police conducted an investigation concerning marijuana transportation

The Nonseizure Field Investigation

Conducting a "Pat-Frisk" Without Cause to Initiate a Stop

In **Commonwealth v. Fraser**, 410 Mass. 541 (1991), the Massachusetts Supreme Judicial Court held that [in some cases] police are lawfully entitled to conduct a "pat-frisk" of a person where the circumstances ***do not give rise to a lawful stop.*** Confused? The **Fraser** decision is a difficult case to fully understand at first. Please read this and the following section very slowly. I am incorporating much of the actual language used by the Court in their analysis. [This case was decided under Fourth Amendment principles because the defendant's attorney did not separately argue under Article 14 of the Massachusetts Declaration of Rights which might have given him more protection].

> In **Fraser,** Boston police received a dispatch about "a man with a gun inside a brown Toyota at 35 High St. in Dorchester," which is located in a "high crime area." On arriving at the scene, the officer saw a group of young men standing on the sidewalk, the defendant among them, but no brown Toyota. As the officer was exiting his cruiser [officer Martin Columbo], he observed the defendant bend down behind a white pick-up truck "as though to pick something up or put something down." Officer Columbo walked up to the defendant and identified himself as a police officer, whereupon the defendant stood up with his hands in his coat pockets. Officer Columbo asked the defendant to remove his hands from his pockets. Columbo then immediately conducted a "pat-frisk" of the defendant and felt an object which turned out to be a loaded handgun. After ascertaining that the defendant did not have a proper license, he was placed under arrest.

In their analysis, the SJC stated that by merely approaching the defendant, identifying himself as a police officer, and asking the defendant to remove his hands from his pockets, ***did not convert the situation into a seizure under the Fourth Amendment*** [**Editor's Important Note:** Recall the section on **encounters**]. However, what about the pat-frisk? Is that a seizure? Does that not trigger the Fourth Amendment? The Court stated that it "plainly implicates the Fourth Amendment and must be justified by a showing that Officer Columbo reasonably believed that the defendant was armed and dangerous."

> **Editor's Note:** Where was the reasonable justification for the "stop?" Was there a "stop" at all in this case? There certainly was a "frisk." It is possible to conduct a "stop" without a "frisk," but how is it possible to conduct a "frisk" without a "stop.?"

The "Nonseizure Field Interrogation"

Editor's Note: The Massachusetts Supreme Judicial Court stated that **Fraser** is an anomalous case "in that the pat-down of the defendant was not proceeded by a forcible stop, the prototypical situation addressed in **Terry.** Officer Columbo simply patted down the defendant in the course of a ***nonseizure field interrogation.*** Therefore, we do not address the issue whether Officer Columbo had the requisite quantum of suspicion to justify a stop."

Editor's Query: Would the **Miranda** warnings be required when conducting a nonseizure field interrogation?
Answer: No. Why? Because the element of custody would be lacking.

Editor's Note: Additionally, the **Fraser** Court stated that "[t]his anomaly also provides a basis for distinguishing our recent decision in **Commonwealth v. Couture,** 407 Mass. 178 (1990)." Remember in **Couture** police received information that a man in a particular automobile possessed a firearm. Police observed the automobile and **pulled it over**. This was a forcible stop which **distinguishes** this case from **Fraser.**

In **Commonwealth v. Fraser,** 410 Mass. 541 (1991), the Court quoting *LaFave* stated that "a protective frisk of a suspect under the principles of **Terry** may be warranted ***where there is some legitimate basis for the officer being in immediate proximity to the person."*** In addition, they stated that "[w]hile the justification for an officer's proximity to a suspect frequently is a **Terry** stop, a pat-down also may be permissible in other situations where the officer necessarily comes into contact with a person he considers dangerous. This is such a case." The Court further stated that "[o]fficer Columbo had a duty to investigate the report of an armed man at the location where the defendant was. Having received a report of an armed man, it would have been poor police work had the officer left the scene without making any inquiries. We conclude that the officer's proximity to the defendant was justified. Therefore, we ask only whether the pat-down was supported by a reasonable belief that the defendant was armed and dangerous even though we recognize that [] the officer may **not have had** sufficient information to justify an investigative stop under **Terry**." **Editor's Note:** Would it be poor police work not to investigate the vehicle in **Couture?** How could they have investigated Couture without effecting an stop? What other police methods would be available to investigate Couture without effecting a forcible stop implicating the Fourth Amendment.

*Also in the **Fraser** decision, the Court gave us four factors to justify the pat-down [and not the stop]:*

(1) the radio call describing a man with a gun
(2) the fact that the encounter occurred in a "high crime area"
(3) the defendant's bending down behind the truck "as though to pick something up or put something down," and
(4) the fact that at all critical times the defendant kept his hands in his pockets

Totality Test for Protective Frisks: In weighing the above factors, the SJC took into account **"the totality of the circumstances**—the whole picture." **United States v. Cortez,** 449 U.S. 411, 417 (1981). Thus, a combination of factors that are each innocent of themselves may, when taken together, amount to the requisite reasonable belief.

Editor's Important Note: Recall the test required by the Court to conduct a stop under **Commonwealth v. Lyons,** 409 Mass. 16 (1990). In **Lyons**, the SJC required a showing of the informant's basis of knowledge and reliability before police could lawfully initiate a **stop [a.k.a. a forcible detention]**. However, this **Frasier** decision is not requiring police to satisfy the two-prong test enunciated in **Lyons** before they can conduct the **pat-frisk [a.k.a. non-seizure field investigation]**, but only a totality of the circumstances test.

The Radio Broadcast Alone Not Enough: In **United States v. Hensley,** 469 U.S. 221 (1985), the Supreme Court addressed the question whether an officer of a police department may make a **Terry** stop in reliance on a "wanted flyer" issued by a neighboring police department indicating that the defendant was suspected of robbery. The Court upheld such a stop provided, among other things, that ***"the police who issued the flyer or bulletin possessed a reasonable suspicion justifying a stop."*** Of course, this requirement is equally applicable where information is transmitted between officers by radio rather than by a wanted flyer, and where the contested police conduct is a **protective frisk *rather than*** an **investigatory stop.** In the instant case, the record is barren of evidence indicating that the officer responsible for issuing the radio call had sufficient information to justify a **Terry**-type frisk, or indeed that he had any reliable information about the defendant at all. Therefore, we are constrained by **Hensley** to conclude that the radio broadcast did not, ***in and of itself***, give Officer Columbo the reasonable suspicion required to conduct a protective frisk. The broadcast, therefore, falls in the category of a factor which taken alone would **not justify** the search, but which taken together with other factors **may constitute** reasonable suspicion.

However, the SJC concluded that, when all the facts are taken together, Officer Columbo had sufficient information to justify the **protective frisk** of the defendant. Officer Columbo was confronted with the following situation. In response to a radio bulletin reporting a man with a gun, the officer found a group of young men at an identical location, which he knew to be a **"high crime area."** The officers were outnumbered. Officer Columbo saw the defendant bend down behind a truck in a manner suggesting that he might be picking something up or putting something down, and then the defendant confronted

the officer with his hands in his pockets. Taken together, these circumstances are enough to warrant belief by a "reasonably prudent man . . . that his safety or that of others was in danger."

Legal Analysis Used to Distinguish Between a Stop and a Pat-Frisk

Under **Commonwealth v. Lyons,** 409 Mass. 16 (1990), police must satisfy a two-prong test before they can conduct a stop. This test shall require police to make a showing of the informant's basis of knowledge and reliability. This standard is required whether or not police conduct a frisk of the subject after the stop. It is the fact that police make a stop that requires them to satisfy this standard. Remember, that a stop will also be categorized as a forcible detention or an investigative detention.

Under **Commonwealth v. Fraser,** 410 Mass. 541 (1991), police must only satisfy a totality test whenever they conduct a pat-frisk *without* a stop. This test is much more flexible test than that announced in **Commonwealth v. Lyons,** 409 Mass. 16 (1990). The flexibility is allowed due to the danger of the officers safety or that of others when confronted with such a situation.

The Law of Arrest Within the Commonwealth

Bringing the Arrestee to Court *[Jenkins' 24 hour Massachusetts rule]*

In **Jenkins v. Chief Justice of the District Court,** 416 Mass. 221 (1993), the Massachusetts Supreme Judicial Court held that whenever police effect a ***warrantless arrest*** of a subject, ***it must be followed by a judicial determination of probable cause within 24 hours of the arrest, including weekends and holidays.***

Jenkins Requires That Determination Be on Oath of Arresting Officer

This determination must also be based on an explicit "oath" or "affirmation" of the arresting officer.

Editor's Note: This decision will have many far reaching ramifications for the criminal justice system here in the Commonwealth of Massachusetts and it should be thoroughly explored to see what mechanisms should be put in place by all police agencies within the Commonwealth to help insulate themselves from both motions to dismiss and motions to suppress evidence and from becoming targets of tort law liability for detaining a prisoner unlawfully.

SJC Refuses to Create Per Se Rule of Dismissal for Enforcement

In **Commonwealth v. Viverito,** 422 Mass. 228 (1996), the SJC refused to lay down a per se prophylactic rule to enforce the mandate of **Jenkins**. In **Viverito**, the SJC stated that "[a] violation of the rule in **Jenkins** [] is this same type of delay that may violate statutory or constitutional rights but has little to do with the evidence to be adduced at trial...."

Remedy of a Jenkins Violation

In **Commonwealth v. Viverito,** 422 Mass. 228 (1996), the SJC, stated that "[a] **Jenkins** violation certainly interferes with rights— but it is instead the general liberty interest in not being held in custody without probable cause. When this interest, wholly separate from the underlying charges, is impermissibly infringed, remedies and enforcement tools such as civil sanctions can protect the right without the adverse consequences of a dismissal with prejudice.

Probable Cause to Effect an Arrest

Probable Cause to Arrest While Possessing a "Baggie" in High Crime Area

In **Commonwealth v. Rivera**, 27 Mass.App.Ct. 41 (1989), police had probable cause to effectuate the arrest of the defendant when he was found in a place known to be of high incidence of drug trafficking and possessed a "baggie," [a container consistent with drug packaging], which he attempted to conceal in his trousers in an evasive reaction to his noticing the police officer's approach. In **Rivera**, there were four elements that established probable cause:

(1) the defendant was in possession of what appeared to be evidence of a crime, "a baggie," reasonably identified as a type of container regularly used in illicit drug transactions
(2) the defendant reacted with behavior reasonably interpreted to be evasive or furtive
(3) the encounter was in a place of high incidence of drug traffic, and
(4) experienced investigators on the scene evaluated the event as indicating present criminal conduct on the part of the accused

Editor's Note: In **Rivera,** the Massachusetts Appellate Court stated that, "[i]t may be assumed that no one of these elements, standing alone, would suffice to establish probable cause for arrest and search." In footnote 3, the Court stated, "[in] the present case the container was capable of use for a lawful as well as an unlawful purpose; where a container appears to have but one use, and that an unlawful one, its identification, standing alone, may be enough to justify a seizure." See **Texas v. Brown**, 460 U.S. 730 (1983) (where the containers triggering probable cause were "tied-off, deflated balloons believed by the police to contain heroin.) Additionally, In **Commonwealth v. Benitez**, 37 Mass. App. Ct. 722 (1994), the Court stated that the concurrence of the first and second factors of **Rivera** [above] "readily cumulate to provide probable cause." But see **Commonwealth v. Alvarado**, 420 Mass. 542 (1995), where the SJC held that placing a glassine bag down the front of one's pants does not rise to the level of probable cause, where the observations were made during a routine traffic stop and **not** during an ongoing police surveillance concerning suspected drug activities. The setting is what differentiates **Alvarado** from **Rivera** and **Benitez** below.

Probable Cause to Arrest When Plastic Bag Placed into Groin Area [investigation concerning drugs]

In **Commonwealth v. Benitez**, 37 Mass. App. Ct. 722 (1994), police observed the defendant was handed something while seated in an automobile. The defendant then left that automobile holding a plastic bag in a closed fist. He then entered his own automobile and placed the plastic bag inside the groin area of his pants. As the police approached the defendant they observed that his pants were undone. One of the officers then reached into the automobile and seized the plastic bag from the groin area of the defendant's pants. The Court held that this fact pattern is controlled by the **Rivera** decision. They stated that identification of a plastic baggie in a person's possession coupled with evasive reactions by him will readily cumulate to provide probable cause. The defendant in **Benitez** was under investigation for drug activity.

Combination of Plastic Bag and Furtive Movement Not Probable Cause [investigation not concerning drugs]

In **Commonwealth v. Alvarado**, 420 Mass. 542 (1995), police stopped a motor vehicle on Route 495 for traffic violations. Upon approaching the vehicle, the police officer observed a clear plastic material, which he believed to be a glassine bag, in the fist of the front seat passenger. The officer further observed the passenger placing that object down the front of his pants. The SJC held that those observations ***did not rise to the level of probable cause.*** The Court stated that "[t]he view of an object of the type commonly used to store controlled substances, is not sufficient to provide the viewing officer with probable cause to seize that object or arrest the individual possessing that object." Additionally, the SJC held that "[n]or does the observation of a furtive gesture, such as attempting to conceal an object, give rise, in and of itself, to probable cause." The Court stated that "[w]e are of the opinion that the combination of these two factors is more akin to a situation giving rise to a reasonable suspicion based on articulable facts justifying a threshold inquiry than to probable cause." The defendant here was not already under surveillance for drug activity, nor was the location a high crime area.

Probable Cause to Arrest When Prescription Pill Bottle Discovered in Groin Area

Recently, in **Commonwealth v. Clermy**, 421 Mass. 325 (1995), the SJC held that the discovery of a small pill bottle secreted in the groin area of a suspect amounted to probable cause that a violation of the narcotic drug laws was afoot. In **Clermy**, police initially placed the defendant under arrest for two outstanding motor vehicle default warrants. During a search incident to arrest, police discovered a small pill bottle in the defendant's groin area. The SJC held that "[i]t is eminently reasonable to infer that a prescription bottle carried in this manner would contain contraband, and, most probably, a controlled substance." The Court looked at the following factors in assessing whether probable cause existed:

1) the defendant had been picked up in an area in which the police recently had made a number of arrests for serious narcotic offenses
2) the defendant was first observed sitting on the steps of a building known to be used for the distribution and consumption of crack
3) the defendant appeared to be apprehensive when approached by the police
4) the officers initially discovered a telephone beeper on the defendant

5) most significantly, the defendant had concealed a prescription pill bottle between his legs

Dwelling House Arrests—Expectation of Privacy

Search of Briefcase Tossed Out of Window While Attempting to Execute an Arrest Warrant

In **Commonwealth v. Straw**, (1996), police attempted to execute a default warrant issued against the defendant for the charge of assault with intent to murder. The defendant was living with his parents. While a police officer was talking with the defendant's mother at the front door, a second officer positioned at the rear of the house saw a window opened on the second floor and a briefcase thrown to the yard below. The briefcase, which was thrown by the defendant, landed about six to ten feet from the house in the back yard between the house and a wrought iron fence. The officer pried open the briefcase and discovered a plastic glassine bag containing cocaine. The Court suppressed the evidence.

Editor's Note on Exigency Argument: The Court held that since there was nopotential loss or destruction of evidence, there were no exigent circumstances justifying the search of inside of the briefcase. The Court also stated that there was nothing to indicate that the briefcase might have contained any dangerous instruments or substances. Although police could have seized the breifcase under the circumstances, a search warrant would be required before it could be opened and it's contents inspected.

Editor's Note on Abandonment Argument: The Supreme Court of Massachusetts stated that since the defendant intended to protect his property from any public scrutiny by placing the property in a closed and locked breifcase and disposing it by throwing it into the fenced-in curtilage of his family's home, he maintained a reasonable expectation of privacy in it. As such, police needed probable cause and a search warrant to open in up and search it.

Exigent Circumstances—Dwelling Houses

Firearms Unlawfully Possessed Inside Dwelling Not Exigent Circumstances

In **Pasqualone v. Gately**, 422 Mass. 398 (1996), a police officer discovered that a person who had a license to carry issued to him had failed to reveal that he had earlier been convicted in the state of Delaware for unlawfully carrying a concealed weapon. Concluding that the person had lied on his application, the police officer considered that license to carry "revoked." Police then went to the defendant's home where they made a warrantless nonconcensual entry and seized his firearms. The Court held that the entry was not justified because the circumstances were not exigent. Merely possessing firearms and ammunition inside of a dwelling house without the necessary licensing requirements (license to carry or FID) do not trigger exigent circumstances.

College Dormitory Entries and Searches

Dormitory Inspection to Enforce Health and Safety Regulations

In **Commonwealth v. Neilson,** 423 Mass 75 (1996), a college student from Fitchburg State College signed a residency contract permitting college officials to effect searches of his dormitory suite to enforce the college's health and safety regulations.

Meow— Meow—Meow!

In **Commonwealth v. Neilson,** 423 Mass 75 (1996), the entry was effected by college officials because a kitty cat was heard meowing. The Court stated that a search for an elusive meowing feline fit within the scope of consent of the residency contract.

Campus Police Require Probable Cause and a Search Warrant Unless an Exigency Exists

In **Commonwealth v. Neilson,** 423 Mass 75 (1996), once the college officials were inside, they discovered two four foot tall marijuana trees. The campus police were then summoned who then seized the contraband. The police entered the room without a warrant, consent, or exigent circumstances. The Court held that the search was unreasonable and violated

the defendant's Fourth Amendment rights. The Commonwealth contended that, since the college officials were in the room by consent, and observed the drugs in plain view while pursuing legitimate objectives, the police officers' warrantless entry was proper. Furthermore, the Commonwealth argues, the police action was lawful because it did not exceed the scope of the prior search and seizure by college officials. The Massachusetts Supreme Judicial Court disagreed *for the following two reasons:*

1) there was no consent to the police entry and search of the room

Editor's Note: The defendant's consent was given, not to police officials, but to the University and the latter cannot fragmentize, share or delegate it. While the college officials were entitled to conduct a health and safety inspection, they clearly had no authority to consent to or join in a police search for evidence of crime.

Editor's Additional Note: The college officials could have reported their observations to the police, *who could have used the information to obtain a warrant.*

2) the plain view doctrine does not apply to the police seizure, where the officers were not lawfully present in the dormitory room when they made their plain view observations

Editor's Note: While the college officials were legitimately present in the room to enforce a reasonable health and safety regulation, the sole purpose of the warrantless police entry into the dormitory room was to confiscate contraband for purposes of a criminal proceeding. An entry for such a purpose required a warrant where, as here, there was no showing of express consent or exigent circumstances.

The Court concluded that when the campus police entered the defendant's dormitory room without a warrant, they violated the defendant's Fourth Amendment rights. All evidence obtained as a result of that illegal search must be suppressed.

Special Needs Entry—Occupant Suffering From Mental Illness Via 123 § 12

Policy Effecting Nonconsensual Warrantless Entry Permissible

In **McCabe v. Life-Line Ambulance Service,** 1996 WL 78310 (1st Cir. Mass.), the United States District Court of Appeals held that the policy of the city of Lynn permitting their police officers to effect nonconsensual warrantless entries to serve an involuntary committal order signed by a physician pursuant to c. 123 § 12 on a recalcitrant dangerous mentally ill person was permissible as a "special needs" entry. The question confronted by the Court was whether the presribed statutory search procedure pursuant to c. 123 § 12 violates the Fourth Amendment since it routinely allows warrantless entries of a residence, *absent exigent circumstances,* to effect involuntary commitments. Such an entry is reasonable held the Court. The Court stated that the entry falls squarely "within a recognized class of systematic 'special need' searches which are conducted without warrants in furtherance of important administrative purposes." In **Griffin v. Wisconsin**, 483 U.S. 868 (1987), cited by **McCabe**, the USSC stated that "[w]e have permitted exceptions when 'special needs,' beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable."

Parens Patriae and Police Power to Effect Searches Pursuant to c. 123 § 12

In **McCabe v. Life-Line Ambulance Service,** 1996 WL 78310 (1st Cir. Mass.), the United States District Court of Appeals stated that "[t]he legitimacy of the State's parens patriae and police power interests in ensuring that 'dangerous' mentally ill persons not harm themselves or others in beyond dispute."

Rejection of Warrant Requirement by McCabe

In **McCabe**, the Court rejected the argument that a warrant would be required under the circumstances. They stated that "[t]he potential consequences attending a delayed commitment—both to the mentally ill subject and others—may be extremely serious, sometimes including death or bodily injury."

Four Categories of Involuntary Commitment Pursuant to c. 123 § 12

The involuntary commitment statute authorizes four commitment procedures:
1) Any physician [] or qualified psychiatric nurse mental health clinical specialist [] or a qualified psychologist [], who after examining a person has reason to believe that failure to hospitalize such person would create a likelihood of serious harm by reason of mental illness may restrain or authorize the restraint of such person and apply for the hospitalization of such person for a ten day period at a public facility or at a private facility authorized for such purposes by the department.
2) If an examination is not possible because of the emergency nature of the case and because of the refusal of the person to consent to such examination, the physician, qualified psychologist or qualified psychiatric nurse mental health clinical specialist on the basis of the facts and circumstances may determine that hospitalization is necessary and may apply therefore.
3) In an emergency situation, if a physician, qualified psychologist or qualified psychiatric nurse mental health clinical specialist is not available, a police officer, who believes that failure to hospitalize a person would create a likelihood of serious harm by reason of mental illness may restrain such person and apply for the hospitalization of such person for a ten day period at a public facility or a private facility authorized for such purpose by the department.
4) Any person may make application to a district court justice or a justice of the juvenile court department for a ten day commitment to a facility of a mentally ill person whom the failure to confine would cause a likelihood of serious harm. After hearing such evidence as he may consider sufficient, a district court justice or a justice of the juvenile court department may issue a warrant for the apprehension and appearance before him of the alleged mentally ill person, if in his judgment the condition or conduct of such person makes such action necessary or proper.

In **McCabe**, the Court stated that since only category four above expressly incorporates a warrant requirement, "we think it clear that the statute implicitly authorizes warrantless searches and seizures in the three remaining contexts." The Court also stated that since the patient refused to be examined, the doctor, in issuing the pink slip, based his opinion exclusively on reports from family members and neighbors. This satisfied the category 2 situation above. ***See important editor's note below.***

Duly Issued Pink Paper From Physician Constitutionally Triggering Warrantless Police

In **McCabe** the Court, in holding category 2 above constitutional, stated that "[a] police officer is permitted to enter a residence without a warrant for the exclusive purpose of detaining a recalcitrant and dangerous mentally ill person pursuant to a duly issued pink paper, but may not engage in a generalized search."

Editor's Note on Police Officer Executing Pink Slip: The pink paper in issue in **McCabe** was signed and issued by a physician based on his medical opinion and knowledge of the past history of the patient. Additionally, the opinion only addresses the constitutionality of category 2 situations. ***This opinion does not state that such entries will be permissible where a police officer executes a pink paper pursuant to a category 3 situation.***

Additional Procedural Protections Under Article 14

Because the Supreme Judicial Court could extend additional protections pursuant to article 14 of the Massachusetts Declaration of Rights, police officers should attempt to obtain a warrant of apprehension issuable pursuant to c. 123 § 12(e) which states:

> "Any person may make application to a district court justice or a justice of the juvenile court department for a ten day commitment to a facility of a mentally ill person whom the failure to confine would cause a likelihood of serious harm. After hearing such evidence as he may consider sufficient, a district court justice or a justice of the juvenile court department may issue a warrant for the apprehension and appearance before him of the alleged mentally ill person, if in his judgment the condition or conduct of such person makes such action necessary or proper."

Lastly, it may be possible to obtain a search warrant under the circumstances pursuant to the common law clause contained in c. 276 § 1 which governs articles which may be seized under a search warrant. *Under M.G.L.A. c. 276, § 1, the following articles may be seized:*

(1) property or articles stolen, embezzled or obtained by false pretenses, or otherwise obtained in the commission of the crime;
(2) property or articles which are intended for use, or which are or have been used, as a means or instrumentality of committing a crime, including, but not in limitation of the foregoing, any property or article worn, carried or otherwise used, changed or marked in the preparation for or preparation of or concealment of a crime;
(3) property or articles the possession of which is unlawful, or which are possessed or controlled for an unlawful purpose; ***except property subject to search and seizure under §§ 42 through 56, inclusive, of M.G.L.A. chapter 138***
(4) the dead body of a human being
(5) the body of a living person for whom a current arrest warrant is outstanding

Common Law Clause

G.L. c. 276 § 1 further states that "nothing in this section shall be construed to abrogate, impair or limit powers of search and seizure under other provisions of the General Laws or under the common law."

Domestic Arrests—Police Powers and Jurisdictional Issues

Arrest Powers on Domestic Abuse Occurring Outside Jurisdiction

Police officers often inquire as to whether they have extra-territorial arrest powers whenever a 209A defendant they are seeking is discovered outside of their jurisdiction. Additionally, another issue that frequently surfaces is whether police have arrest powers when they are notified that a 209A defendant is presently within their jurisdiction and is wanted by an outside agency within Massachusetts for domestic violence. Does it make any difference if a restraining order is in effect?

Editor's Note Where 209A-Defendant Leaves Jurisdiction: Just because police are investigating a 209A situation, it does not expand or extend their powers of arrest. Unless police are engaged in fresh and continued pursuit of a 209A defendant, they have no right to effect an arrest outside of their jurisdiction. In fact, the only way a police officer could effect an arrest outside of his jurisdiction without engaging in fresh and continued pursuit would be if he were effecting an arrest for a felony as a citizen or if he had an arrest warrant. Since most 209A situations are misdemeanors, police officers will not be able to leave their jurisdiction to effect the arrest. To ensure that the 209A-defendant is captured, police can either obtain an arrest warrant from the clerk magistrate or they may rely on c. 276 § 28, discussed below.

C. 276 § 28—Arrest on Probable Cause That Defendant in Your Jurisdiction Has Violated Order

M.G.L.A. c. 276 § 28 states that "[a]ny officer authorized to serve criminal process [] may arrest, without a warrant, and detain a person whom the officer has probable cause to believe has committed a misdemeanor by violating a temporary or permanent vacate, restraining, or no-contact order or judgment issued pursuant to section eighteen, thirty-four B or thirty-four C of chapter two hundred and eight, section three, four or five of chapter two hundred and nine A, section thirty-two of chapter two hundred and nine, or section fifteen or twenty of chapter two hundred and nine C.

Editor's Note: Even though the statute uses the words "may arrest," the above provision should be interpreted as requiring a mandatory arrest by the foreign agency whenever an order has been violated in light of the statutory language of c. 209A § 6.

C. 276 § 28—Arrest on Probable Cause That Defendant in Your Jurisdiction Has Committed Domestic Abuse

M.G.L.A. c. 276 § 28 also states that "[s]aid officer may arrest, without a warrant, and detain a person whom the officer has probable cause to believe has committed a misdemeanor involving abuse as defined in section one of chapter two hundred and nine A or has committed an assault and battery in violation of section thirteen A of chapter two hundred and sixty-five against a family or household member as defined in section one of chapter two hundred and nine A.

Defendant Discovered in Your Jurisdiction Can Be Arrested Without a Warrant on Probable Cause

Therefore, irrespective of whether an order is in effect, police may effect the arrest of a 209A defendant found within

their jurisdiction on ***probable cause*** that he or she has committed a 209A violation anywhere within the Commonwealth of Massachusetts. The agency effecting the arrest can either transport the defendant back to the requesting agency or the requesting agency may transport the defendant back to their jurisdiction from the arresting agency, whichever policy they have. [**Editor's Note:** See below the duel booking process.] Remember, that since the defendant has already been placed under arrest by the arresting agency, there will be no legal problem concerning misdemeanor arrest powers of the requesting agency outside their jurisdiction. The defendant has already been placed under formal arrest. Even though it is their case, the requesting agency is merely transporting the [already-under-arrest] defendant back to their jail for processing.

Editor's Example: The Fall River police respond to a domestic disturbance. Pursuant to their investigation, they develop probable cause that Smith has battered and abused his wife. There is no restraining order in effect. Fall River police additionally discover that the suspect is in New Bedford at his workplace. The above chapter and section, c. 276 § 28, empowers the New Bedford police on probable cause to go the suspect's workplace and effect his arrest. The New Bedford police can either transport the suspect back to the Fall River police department or the Fall River police can go to New Bedford where the [already-under-arrest] suspect can be transferred over to them by the New Bedford police. If the latter alternative is utilized, the transfer could be effected either at the arrest scene or back at the New Bedford police station, depending on how the New Bedford police would prefer to document the arrest. Lastly, it should be noted here that in this example the New Bedford police would only be effecting the arrest, they would not be initiating the criminal complaint procedure against the suspect. That would be completed by the Fall River police once they return to their police station and process the suspect. Remember, that the Fall River police could not effect the misdemeanor arrest in New Bedford because they are outside their jurisdiction.

Editor's Note on Duplicate Booking: In the above fact pattern, it should be the policy of the New Bedford police department to first bring the suspect to their stationhouse and run him through the booking process to properly record the fact that he has been arrested. Subsequent to the New Bedford booking procedure, the suspect can then be turned over to the Fall River police, who will then transport the suspect back to Fall River and run him through their own booking procedure. This duplicate booking procedure ensures that the both police agencies have properly recorded the facts and circumstances of the arrest and transfer of the suspect.

Police Outside Territorial Jurisdiction Have No Arrest Powers—Even on 209A Violations

What if the Fall River police in the above example went to the defendant's workplace in New Bedford and effected his arrest? Would this be permissible? Answer—no. Why? Because the Fall River police only have arrest powers within their territorial jurisdiction. Since they are in New Bedford, they are no longer police officers. Addtionally, since the crime of domestic assault and battery is only a misdemeanor, the Fall River police will be unable to effect an arrest as a citizen. Furthermore, even if a violation of a 209A order ocurred, the Fall River police would still be unable to effect an arrest. Why? Because violating a 209A order is only a misdemeanor.

Editor's Note on Felony: However, if probable cause exists that a the defendant committed a felony as part of the domestic abuse violation, whether or not an order was in effect, the Fall River police could effect an arrest anywhere within the Commonwealth of Massachusetts. No warrant, or no fresh and continued pursuit would be required. It would be valid as a citizen's arrest—*as long as probable cause existed at the time of the arrest.*

Abuse Prevention Order—Violation by Sending Flowers

In **Commonwealth v. Butler,** 40 Mass. App. Ct. 906 (1996), the Court decided that the act of sending of flowers by the defendant to the plaintiff would constitute a violation of a 209A restraining order. The language of a 209A restraining order which requires the defendant "not to contact the plaintiff...either in person, by telephone, in writing, or otherwise, either directly or indirectly or through someone else" will include situations where the defendant sends flowers to the plaintiff.

Abuse Prevention Order—Nonhostile Intent Irrelevant

In **Commonwealth v. Butler,** 40 Mass. App. Ct. 906 (1996), the Court held that protestations of nonhostile intent or a desire to make amends on the part of the defendant are irrelevant to the enforcement of a no-contact order.

Civil Action Taken Against Police Officer—Good Faith Statutory Defense

C. 209A § 6 states that "[n]o law officer shall be held liable in any civil action regarding personal injury or injury to property brought by any party to a domestic violence incident for an arrest based on probable cause when such officer acted reasonably and in good faith and in compliance with this chapter and the statewide policy as established by the secretary of public safety."

Venue of 209A Domestic Abuse—C. 277 § 62A

Any criminal violation of chapter two hundred and nine A may be prosecuted and punished in the territorial jurisdiction in which the violation was committed or in which the original order under said chapter two hundred and nine A was issued.

Police Powers of Arrest Pursuant to 209A—Two Prong Test Example

Massachusetts uses the two prong test approach in establishing probable cause whenever they develop or receive information from a third-party. The test is made up of a veracity prong and a basis of knowledge prong. **Example:** Police respond to a domestic violence call. Upon their arrival, they meet Mrs. Smith. Mrs. Smith states to the police that she has just had a fight with her husband Fred. Police are told by Mrs. Smith that Fred grabbed her by her bathrobe and threw her onto the floor. She states that Fred is across the street at the local tavern having a few cocktails. Since Mrs. Smith is a **victim**, she is inherently reliable. No track record or corroboration of facts is required. Therefore, the veracity prong is satisfied. As for the second prong of the test, the basis of knowledge prong, she has already personally stated that she herself was thrown down onto the ground by Fred. This satisfies the basis of knowledge prong. Since both prongs of the test are met, probable cause fully exists to effect the arrest of Fred.

Editor's Note on Spousal Denial of Assault: A common misconception exists between many police officers concerning the above example and whether probable cause to arrest will continue to exist even where the defendant denies the allegations in front of police. The common misconception which exists is that the denial will somehow reduce the evidentiary value of the victim's statement from probable cause to reasonable suspicion, thereby taking away the officer's power of arrest. Irrespective of the denial, probable cause will continue to exist as well as the officer's power of arrest. The evidentiary value of the statements will be weighted by the court.

Police Interrogation—What Amounts to Interrogation?

Police Response of "Why?" in the Face of Initial Incriminating Statement Made by Defendant

In **Commonwealth v. Diaz,** 422 Mass. 269 (1996), the defendant was placed under arrest. He was later fingerprinted by detectives. Before being printed, the defendant blurted out, "This is really going to fuck me up." The detective then responded, "why?", and the defendant made a second statement, saying that he had handled one of the firearms used in the crime on the previous day. The issue presented here was whether the **Miranda** warnings were required for both of the statements made by the defendant. The Court stated that the first statement ["This is really going to fuck me up."], was spontaneous and unprovoked by the police detective, there no **Miranda** warnings were first required. The detective's response ["why?"], a one word question, was described by the Court as a "natural flex action" of the detective, invited by the defendant's first statement. The Court stated that "[a]lthough the second statement was incriminatory, it was volunteered and not the product of improper probing questioning."

Police Interrogation—Reinterrogation

Clarification of Criminal Charge Held to be Interrogation

In **Commonwealth v. Chadwick,** 40 Mass. App. Ct. 425 (1996), the defendant was administered the **Miranda** warnings. After waiving the **Miranda** warnings, he was questioned concerning sexually assaulting his daughter. After making an inculpatory statement, he invoked his right to counsel. He was then arrested and booked. The next day, and while still in continuous custody, he stated to a police detective that he knew that he did not rape his daughter. The detective then replied as follows: "I will tell you one thing, but this is not meant to be a question. Rape is not always what people think

and things like oral sex are rape." The defendant then replied, "Well I don't know where I go from here, because if that's considered rape then I guess I'm guilty." The Court held that the police violated the rule of **Edwards v. Arizona**, 451 U.S. 477 (1981) which states that once a prospective defendant invokes his right to counsel, further interrogation without counsel is impermissible. The Massachusetts Court of Appeals stated that "[t]he officer's response to the exculpatory statement by the defendant, though not posed as a question, certainly invited a response." The Court then ruled that "when a suspect in custody asks for a lawyer, discussion of the charge should cease unless that suspect changes his mind, either in so many words or by conduct clearly to that effect."

Police Interrogation—Miranda Not Required for Booking Phone Numbers

Miranda Not Required Where Police Routinely Asked Defendant For Phone Number Called at Booking

In **Commonwealth v. White**, 422 487 (1996), the police routinely wrote down the telephone number the defendant would call subsequent to booking pursuant to c. 276 § 33A. The Court stated that "the **Miranda** warnings are only implicated by words or actions on the part of the police that they should know are reasonably likely to elicit an incriminating response." A police policy of routinely writing down and keeping track of telephone calls made by a defedant exercising his or her rights pursuant to c. 276 § 33A, does not require **Miranda**.

Police Identification—Video Showup One on One

One on One Video Showup Four Days Subsequent to Event Permissible

In **Commonwealth v. Austin**, 421 Mass. 357 (1995), the Massachusetts Supreme Court permitted the viewing by a witness of a bank surveillance videotape taken of an armed robbery suspect in the act of a subsequent robbery three days later. It was not unnecessarily suggestive under the circumstances. In **Austin**, an armed man entered the First Federal Savings Bank in Somerset and attempted to rob it. A female employee of the bank gave a very fitting description to police. She also went to the Somerset police department and assisted ther Somerset police in manufacturing a composite drawing of the suspect. Three days later, a bank in Rhode Island was robbed. This robbery was captured on the bank's surveillance video camara. The police watched the videotape of the robbery and noticed that the individual on the videotape resembled the witness's composite drawing of the Somerset robber. The mannerisms displayed by the Rhode Island robber, and the similar modus operandi, led the police to believe that the two banks had been robbed by the same individual. Additionally, a Somerset detective learned from a colleague of a recent armed robbery in Salem, New Hampshire, having characteristics similar to the Somerset and Rhode Island robberries. The next day [four days after the Somerset attempt], the police showed the videotape of the Rhode Island robbery to the witness. Within seconds of observing the man on the videotape, the witness stated that he was the man who robbed the Somerset bank.

The Massachusetts Supreme Judicial Court stated that "[t]he identification procedure using the surveillance videotape was similar to a one-on-one confrontation between the suspect and the witness." The Court concluded that, in circumstances, which included a serious risk to public safety posed by a series of crimes having similar modus operandi and [an] eyewitness[] who appeared exceptionally nonsuggestible, the police had good reason for what they did, and the surveillance videotape identification was not, as a result, unnecessarily suiggestive."

Police Identification—Unnecessarily Suggestive Identification

Unnecessarily Suggestive Identification Not Arranged by the Police

In **Commonwealth v. Jones**, 423 Mass. 99 (1996), two Vietnamese men and two African-American men forcibly entered a home in Fitchburg and assaulted an occupant in the late afternoon. Within three hours of the crime, police arrested the two Vietnamese culprits. There was evidence that the two Vietnamese males had stayed at the Super 8 Motel in Leominster with two black men. An assistant manager at the Super 8 testified that she observed one of the black males [the defendant] in the company of the Vietnamese men in the afternoon on the day of the crime. She subsequently made an in-court identification of the defendant [Jones]. The basis of her identification was objected to by the defendant claiming that it was based on highly suggestive confrontations with the defendant that neither the police nor the prosecution arranged and further, that the identification was not based independently on the witness's original observations of the person whom she identified as the defendant.

The assistant manager [the witness], was on duty the afternoon of the crime. At some point during the the afternoon, she observed a black man come into the lobby walking from the front door to the elevator, and he disappeared into the elevator and reemerged about 10 minutes thereafter. He went back outside through the lobby and got into a car and drove away. The witness observed that person for three minutes. At the time of her observation, there was no event then transpiring at the motel to draw her attention to him in any particularized way. Three months later, while attending a probable cause hearing under a summons issued by counsel for a co-defendant, she wound up sitting in a courtroom. At some point, the defendant [Jones] and the co-defedant [a Vietnamese male] were in the courtroom handcuffed and shackled together. She had the opportunity to watch them for more than an hour. At no time while she was in the courthouse did she have any contact with the district attorney or police officials. Neither did the district attorney nor the police in any way, assisted in the observations made by the witness. Another six months later, she was summonsed by the Commonwealth in connection with a suppression motion. While seated in the courtroom hallway, she observed Jones again shackled to the co-defendant being led into the courtroom. Again neither the district attorney nor the police arranged for her to view Jones. When the witness eventually testified at the suppression motion, both the co-defendant and the defendant-Jones were seated at the counsel table, clearly the object of the courtroom proceeding. She then made an in-court identification of Jones.

Editor's Note: Both of the confrontations between the assistant manager and Jones were accidental in the sense that the Commonwealth played no part in arranging or assisting in arranging those encounters. In other words, there was no state action. However, should the same considerations that are relevant to a governmental-based challenge to admission of an identification be involved in deciding the admissibility of an identification arguably tainted by a civilian-conducted suggestive confrontation? The Massachusetts Supreme Judicial Court found that these identifications were highly suggestive and that her subsequent in-court identification of the defendant were based on these suggestive confrontations. Bypassing the issue of state action, the Court stated that "[c]ommon law principles of fairness dictate that an unreliable identification arising from the especially circumstances of this case should not be admitted."

Right to Presentment—6 Hour Safe Harbor Rule

Massachusetts Rules of Criminal Procedure

Rule 7(a)(1) of the Massachusetts Rules of Criminal Procedure provides that "[a] defendant who has been arrested shall be brought before a court if then in session, and if not, at its next session."

Editor's Note: The intention in back of this rule is that the presentment should occur as soon as possible. However, police departments had difficulty interpreting the extent of the rule once an arrest was effected. For an example, if police arrested a murder suspect at 9:00 a.m., would it be unreasonable to interrogate him throughout the day and then have him arraigned the following morning, or would police have to arraign him as soon as possible subsequent to the arrest. Certainly the law should permit police officers to conduct an interrogation of the suspect subsequent to the arrest. However, police must not be able to unreasonably delay the right of the defendant to prompt presentment in order to receive a confession through police custodial interrogation. Recently, the SJC in **Commonwealth v. Rosario**, 422 Mass. 48 (1996), adopted a bright line rule where a criminal defendant is not arraigned within six hours of his arrest, any statements he makes prior to arraignment will be suppressed on the ground of "unreasonable delay" unless the defendant has waived the right to be arraigned without unreasonable delay. The Court stated that police officers are entitled to a clear rule concerning both the right of the police to question an arrested person and the standard for suppressing statements made by a defendant after arrest and before arraignment.

6 Hour Arraignment or Statements Barred Based on Unreasonable Delay

In **Commonwealth v. Rosario**, 422 Mass. 48 (1996), the SJC held that where a criminal defendant is not arraigned within six hours of his arrest, any statements he makes prior to arraignment will be suppressed on the ground of "unreasonable delay" unless the defendant has waived the right to be arraigned without unreasonable delay. The Court stated that "an otherwise admissible statement is not to be excluded on the ground of unreasonable delay in arraignment, if the statement is made within six hours of the arrest (day or night), or if (at any time) the defendant made an informed and voluntary written or recorded waiver of his right to be arraigned without unreasonable delay."

Editor's Note on Safe Harbor: This new rule requires an additional waiver of the right to prompt presentment by the defendant *if the incriminating statements are made to police six hours or more after the arrest.* In other words, police will be navigating in a safe harbor for the first six hours subsequent to the arrest and the additional waiver of prompt arraignment will not apply within that time frame.

Applicability of Rule to Nighttime and Weekend Arrests: It will make no difference if the arrest is effected during the nighttime or on the weekend when the Courts are closed. The six hour rule will still apply. Therefore, in order for an incriminating statement to be admissible after six hours has elapsed subsequent to the arrest, police must receive from the defendant a knowing, intelligent and voluntary waiver of the **Miranda** warnings as well as "an informed and voluntary written or recorded waiver of his right to be arraigned without unreasonable delay."

Excluded Statements Outside of Safe Harbor Rule Includes Crimes to Which No Complaint Has Been Issued

In **Commonwealth v. Ortiz**, 422 Mass. 64 (1996), the SJC stated that there was no need to distinguish between police questioning about a crime as to which charges are pending and a crime as to which no complaint has yet been issued. Therefore, where police arrest a person on a warrant [i.e., where probable cause determination is made by independent source other than the police], the six-hour safe harbor rule will still apply where the questioning applied to that same offense.

Type of Waiver of Presentment Required Where Police Navigate Outside Safe Harbor *[written or recorded]*

In **Commonwealth v. Rosario**, 422 Mass. 48 (1996), the SJC stated that "an informed and voluntary written or recorded waiver of his right to be arraigned without unreasonable delay" will be required if police are navigating outside of the 6 hour safe harbor rule.

Police Procedures Which Must Be Undertaken Where Police Navigate Outside Safe Harbor

In **Commonwealth v. Rosario**, 422 Mass. 48 (1996), where the police attempt to obtain an incriminating statement from a subject under arrest for longer than six hours, the following police procedures must be adhered to:

a) the individual has been informed of his right to a reasonably prompt arraignment and has made an informed and voluntary written or recorded waiver of that right
b) the statement is made following a knowing, intelligent, and voluntary waiver of the **Miranda** warnings, and
c) the requirements of c. 276 § 33A, notice of the rights to a telephone call, are afforded

Tolling of the Safe Harbor Rule

In **Commonwealth v. Rosario**, 422 Mass. 48 (1996), the SJC stated that if the person is incapacitated because of a self-induced disability, such as the consumption of drugs or alcohol, when he or she is arrested, "the six hour period [will] commence only when the disability terminates."

Police Make Determination Whether Safe-Harbor Should Be Tolled

In **Commonwealth v. Christolini,** 422 Mass. 854 (1996), the Massachusetts Supreme Judicial Court stated that it is "implicit in the tolling of the safe-harbor period because of intoxication is the ability of police themselves to make that determination, subject to judicial review."

Protocol Recommended by the Office of the Attorney General

In the March 1996 Law Enforcement Newsletter from the Office of the Attorney General, *the following protocol is recommended:*

■ Police officers should ensure that the time of the arrest is documented and that upon arrival at the station, the arrested individual is immediately notified of his right to use the telephone ***and is afforded the right to use the telephone within one hour.***

■ The police officers and booking sergeant should ensure that the booking procedure is expedient—the six hour clock

will be ticking.

■The interview of the arrested individual should take place as quickly as possible after the booking process is completed. The interviewing officer should ensure that the arrested individual has been advised of his **Miranda** rights and that before the questioning begins, the arrested individual has made a voluntary, intelligent, and knowing waiver of his **Miranda** rights.

■Police officers should always be mindful of the six-hour "clock."

■If the questioning begins before the six-hour "clock" has expired, no arraignment warning/waiver need be presented to the arrested person before questioning.

■If questioning has begun within the six-hour period but it appears that the questioning will not be completed within the six-hour period, the prompt arraignment notice/waiver should be presented to the arrested individual for his signature if this has not already been done. Generally, the detectives taking the statement will present the waiver to the arrested person. If the arrersted individual refuses to sign the prompt arraignment notice/waiver, questioning should not necessarily cease [if police are still within the safe harbor rule].

■If the interview does not begin before the six-hour "safe harbor" period expires, the police officer conducting the interview must present the arraignment notice/waiver to the arrested individual for his signature before the questioning begins. If the arrested individual refuses to sign the prompt arraignment notice/waiver, police should not necessarily cease questioning. Police officers should note that the arrested individual was advised of his right to be arraigned promptly and he indicated he wanted to be arraigned. Note, however, that if the arrested individual invokes his Fifth Amendment right not to incriminate himself or his Fifth Amendment right to counsel, then questioning must cease.

Editor's Note: Where the arrestee refuses to sign the prompt arraignment waiver, continued questioning is suggested by the AGs office. This may lead to additional clues or avenues the investigation can follow. However, if the arrestee invokes his Fifth Amendment right not to incriminate himself or his Fifth Amendment right to counsel, ***then questioning must cease.***

■Police officers should note the time that the interview started and the time it ended. Police officers taking statements should be careful to distinguish between the time the interview began and the time the statement was typed, if the statement is not typed simultaneously with the giving of the statement (the preferred procedure).

Model Waiver of Miranda and Presentment

The following is a model waiver of the **Miranda** warnings and a waiver of the right to presentment based on the recent case of **Commonwealth v. Rosario**, 422 Mass. 48 (1996):

■ **Right to the Telephone**

■ Pursuant to c. 276 § 33A, you have the right to use the telephone to communicate with family or friends, or to arrange for bail, or to contact an attorney. Do you understand this right?

■ **Miranda Warnings**

■ You have the right to remain silent—do you understand this right?
■ Anything you say can be used against you at trial—do you understand this right?
■ You have the right to an attorney—do you understand this right?
■ If you cannot afford an attorney, one will be appointed to you by the Commonwealth at no expense and prior to any questioning—do you understand this right?
■ If you decide to waive your Fifth Amendment Rights pursuant to **Miranda**, you may stop answering questions at any time if you so desire—do you understand this right?

■ **Presentment Warnings**

■ You have a right to prompt presentment, that is, to be brought as soon as possible before the court if then in session, and if not, at its next session—do you understand this right?
■ During presentment, if it is acertained that you cannot afford an attorney, one will be appointed for you—do you understand this right?
■ If there is an issue of bail, you will have the right to a hearing—do you understand this right?
■ You have the right to a judicial determination of probable cause within 24 hours if you have been arrested without a warrant—do you understand this right?
■ If you waive your right to prompt presentment, you will be brought to court on: Date_____ Time_____

Waiver of Miranda Warnings

Having these rights in mind, do you now waive your Fifth Amendment Rights pursuant to **Miranda**, and desire to talk to me now concerning this or others matters of concern to us?

_____YES, I wish to talk to you now and waive my Fifth Amendment Right pursuant to **Miranda**.

Signature _____ Date _____ Time _____
Signature-Witness_____ Date _____ Time _____
Signature-Police Officer_____ Date _____ Time _____

Waiver of Prompt Presentment

Having these rights in mind, do you now waive your right to prompt presentment and desire to talk to me now concerning this or others matters of concern to us?

_____YES, I wish to talk to you now and waive my right to prompt presentment before the court.

Signature _____ Date _____ Time _____
Signature-Witness_____ Date _____ Time _____
Signature-Police Officer_____ Date _____ Time _____

1997 MV Procedure

MVs—Stop and Frisk

Unreasonable Detention After Valid License and Registration Received—Suppression of Observation

In **Commonwealth v. Torres,** 40 Mass. App. Ct. 6 (1996), police effected a stop of a motor vehicle for excessive speed. The vehicle pulled over on the breakdown lane of the highway. The officer then approached the suspect vehicle from the passenger side. Looking through the passenger's side window, the officer observed the passenger conversing with the driver with his back toward the officer. About twenty seconds elapsed and the officer knocked on the window. In response, the passenger opened the door and started to get out. The officer then ushered the passenger to the rear of the car to separate him from the driver. The officer then returned to the passenger side of the vehicle and asked the operator for his license and registration. The operator then produced the requested information. The driver appeared nervous. Once the officer determined that the driver's Massachusetts operator's license and motor vehicle registration were valid and had not expired, he returned to the passenger who remained, as directed, at the rear of the vehicle. The officer then requested the passenger's wallet and subsequently searched it discovering written notes that he believed were drug related. After seizing the wallet from the passenger, the officer, who could still observe the operator through the rear window of the vehicle, noticed the driver move his right hand near his jacket pocket. The officer approached the driver, who remained inside the car. The officer then patted the side of the driver's jacket, felt a hard object, and recovered a telephone beeper. The officer twice asked the operator whether there were drugs in the car. The driver responded, "No, there's no drugs—search." The officer then discovered a plastic shopping bag hidden behind a hinged panel attached to the rear passenger side. The plastic bag contained a number of small baggies with a white powder in them. The passenger and the operator were then placed under arrest. The Court suppressed the evidence.

The **Torres** Court noted that the officer continued to interrogate and detain the passenger ***after*** the operator had produced a valid license and registration. This detention could only be justified if the officer had reasonable suspicion that a crime was being committed or was about to be committed by the passenger. The Court held that there was no such reasonable suspicion and the detention at the rear of the suspect vehicle was unjustified. The Court stated that there was no apparent reason why the passenger and the driver should not have been permitted to continue on their way. If the officer did not unjustifiably detain the passenger at the rear of the vehicle, the officer would not have been in the position to observe the operator's furtive movement. Without that observation, the officer would have had no occasion to obtain the driver's consent to search the vehicle. Without that consent, the officer would not have discovered the cocaine which led to the arrests. The observation of the furtive movement and the discovery of the cocaine was suppressed as fruit of the poison tree.

Editor's Note: The stop was initially permissible because the officer observed a motor vehicle violation. Additionally, the Court held that "[t]he [passenger's] unexpected attempt to get out of the vehicle, coupled with his delay in acknowledging the [officer], justified the [officer's] initial concern and removal of the defendant to the rear of the vehicle for safety reasons." A frisk for weapons on the person of the passenger would have been permissible at this point, *if the officer would have performed one.* However, this unusual conduct by the passenger did not justify the officer in continuing to detain him at the rear of the stopped vehicle ***after*** the operator's license and registration were checked out.

Actions Not Amounting to Reasonable Suspicion to Continue to Detain Passenger

In **Commonwealth v. Torres,** 40 Mass. App. Ct. 6 (1996), the Court held that the following factors did not rise to the level of reasonable suspicion that the passenger was committing or about to commit a crime which would have justified his continued detention at the rear of the suspect vehicle in which he had earlier alighted:

a) the passenger failed to acknowledge the officer's presence for twenty-five seconds
b) the passenger unexpectedly tried to get out of the vehicle [this would have justified a frisk at the time it occurred]
c) the driver resided in an area known to the officer for high drug activity
d) the driver was born in Medellin, Colombia and appeared to be nervous

Passenger Has a Greater Expectation of Privacy Than Driver

In **Commonwealth v. Torres,** 40 Mass. App. Ct. 6 (1996), the Court stated that in a routine traffic stop, "certainly the passenger has a high expectation of privacy than the driver, because the passenger plays no part in the routine traffic infraction and has reason to suppose that any exchange with the authorities will be conducted by the driver alone."

Refusing to Vacate Passenger Compartment Upon Police Order

In **Pennsylvania v. Mimms**, 434 U.S. 106 (1977), the USSC stated that a police officer may order the operator or occupants out from the passenger compartment of a lawfully stopped vehicle, as long as it takes place at the outset of the stop. The officer is entitled to do this for his own protection. This reduces the opportunity for unobserved movements on the part of the occupants and it also allows the police officer to move off the street and out of the way of traffic. The Mimms decision cited statistics that approximately 30% of shootings of police officers occur during roadside stops. The nature of the crime is not controlling. What if the occupant refuses to alight from the lawfully stopped motor vehicle in disregard of the officer's express order? In **Commonwealth v. Bosk**, 29 Mass. App. Ct. 901 (1991), a motorist stopped for a motor vehicle infraction refused an officer's order to reenter his motor vehicle and demanded that he be able to look at the police radar in the police cruiser. The Court upheld his arrest as a disorderly person because there was no legitimate purpose involved in his actions. The evidence demonstrated that by his conduct he was risking not only his own safety but that of others.

Editor's Note: What legitimate purpose can be served by the operator refusing to comply with a police officer's order to exit a lawfully stopped motor vehicle? Remember that the **Mimms** decision entitles the investigating officer to ***order*** the operator or occupants out of the vehicle. The officer is entitled to do this for his own protection because it reduces the opportunity for unobserved movements on the part of the occupants and it also allows the investigating officer to move off the street and out of the way of traffic. Once the operator or occupant refuses to comply with the officer's order, there is no legal reason why an analogy of **Bosk** cannot be used under the circumstances.

Delay in Acknowledging Presence of Officer Outside Stopped Vehicle by Passenger

In the recent decision of **Commonwealth v. Torres,** 40 Mass. App. Ct. 6 (1996), the Court stated that an officer's concern with a passenger's failure to acknowledge his presence outside of the stopped vehicle for approximate twenty-five seconds justified the removal of that passenger to the rear of the vehicle for safety reasons.

MVs—Pretextual Traffic Stops

Pretextual Traffic Stops

In **Commonwealth v. Santana**, 420 Mass. 205 (1995), police were stationed on the side of Route 24 in West Bridgewater monitoring traffic. The officers were assigned to be on the lookout for traffic violations as well as illegal drug activity during their highway patrol duty. The officers then observed the defendant's motor vehicle with a passenger in the front seat drive by. Suspecting that it might contain drugs, the officers entered the highway and pulled in behind the motor vehicle to observe it more closely. The officers then observed that the motor vehicle had a broken taillight lens and decided to pull the vehicle over to the side of the road. Subsequent to the stop, police discovered cocaine in a clear plastic bag under the passenger's seat. The defendants argued that the stop by the police for the taillight was effected as a pretext to stop and search the vehicle for narcotics. In **Commonwealth v. Santana**, 420 Mass. 205 (1995), the SJC stated that Massachusetts cases follow the "authorization" approach on stopping vehicles. Under that approach, the stop was proper. They stated that "[t]he fact that the [police] may have believed that the defendants were engaging in illegal drug activity does not limit their power to make an authorized stop."

Editor's Note: Recently, in **Whren v. United States,** 116 S.Ct. 1769 (1996), the United States Supreme Court stated that police may effect the stop of motorist whom they have probable cause to believe has committed a civil traffic violation. The officers subjective motive for stopping the vehicle "plays no role in the ordinary probable cause-Fourth Amendment analysis"—even if the stop of the motorist was a pretext for a criminal investigation. However, the Equal Protection Clause of the 14th AMD protects against intentially discriminatory law enforcement based on impermissible considerations such as race.

MVs—Public Policy Consideration

Checking on the Well Being of a Parked Operator

In **Commonwealth v. Leonard,** 422 Mass. 504 (1996), a police officer observed a vehicle pull off to the side of the roadway into a breakdown area. The officer pulled his cruiser alongside of the vehicle and activated his dome lights. The officer attempted several times to gain the attention of the operator by using the cruiser's PA system, to no avail. The officer then exited his cruiser and approached the driver's side and knocked on the driver's window approximately three or four times. When the operator failed to ackowledge the presence of the officer, the officer opened the driver's door. The female operator looked up at the officer and stated, "what the fuck do you want." The officer then requested her license and registration which she eventually produced. During this time, the officer detected a strong smell of alcohol coming from her breath. She was subsequently placed under arrest for OUI. *The Court stated that the action of the officer was reasonable in light of the circumstances.* Her stopping when and where she did suggested that she was in difficulty. Her failure to acknowledge the officer suggested that she may have been ill. The Court stated that what the officer "did here was a minimally intrusive response to one of the myriad and uncategorizable events that may alert an officer that his assistance may be required."

MVs—Stopping a Motorist Police Believe is Lost; Community Caretaking

Stopping a Lost Motorist Impermissible

Recently, in **Commonwealth v. Canavan,** 40 Mass. App. Ct. 642 (1996), police stopped a motorist believed to be lost. The officer then discovered that the operator was intoxicated. The operator was subsequently then placed under arrest for OUI. Initially, the officer observed the defendant's motionless car adjacent to a rotary. The defendant remained in that position for almost three minutes. He was looking around. The officer then turned his cruiser around to go over toward the defendant's car. The defendant then moved away within a reasonable speed. The officer then stopped at a red a Mobile station which was closed. The officer could still see the defendant operating. The defendant then pulled into the Mobile station parking lot. There was no conversation between the two. The defendant then left the Mobile station and drove down the street. The officer then pulled him over to the side of the roadway where he discovered that the operator was intoxicated. The Court stated that such a seizure of a lost motorist does not predominate any governmental interest. The Court also stated that the officer could have made his presence known in the parking lot of the Mobile station where the motorist had pulled into. If the operator was seeking assistance, he could have simply asked the officer for directions at that time.

Stopping a Motorist for Reasons Unrelated to Law Enforcement or Regulatory Purposes

In **United States v. Dunbar,** 470 F.Supp 704 (D. Conn.), aff'd, 610 F.2d 807 (2d. Cir. 1979), Judge Jon Newman formulated an opinion wherein he described a balancing of the interests of the permissiblity of police officers stopping a lost motorist based on the governmental interest on one side and the privacy interests of the motorist on the other. In **Dunbar,** a Connecticut State Trooper observed a vehicle with Rhode Island plates moving at a slow speed and showing uncertainty in selecting which road he should take. The trooper activated his dome lights and pulled the vehicle to the side of the roadway. The stop led to the discovery of an unlawful weapon in plain view on the front seat and a suspected bomb on the rear floor of the vehicle.

Editor's Note: Since the intrusion clearly amounted to a seizure, the reasonableness of the seizure depends on a balance between the public interest and the individual's right to personal security free from arbitrary interference by police officers. The United States Supreme Court recognized in **Cady v. Dombrowski,** 413 U.S. 433 (1973), that police officers may intrude to some extent on the individual's privacy when they perform "community caretaking functions" unrelated to crime-detection or regulatory purposes. The Massachusetts Appeals Court stated that "it is undeniable that the rendering of assistance to a motorist in that caretaking mode ***can in some situations*** justify motor vehicle stops." In **Dunbar,** Judge Newman illustrates this point with a case where the police stop a motorist to inform him that a bridge beyond a bend in the road has washed away, or a case where a road remains passable but the police promote safety by stopping the motorist to inform him about road hazards.

Editor's Note: In **Dunbar,** the Court, as it concerns sinmply a lost motorist, held that the governmental safety interest in aiding the lost motorist is not substantial. On the other hand, the intrusion on the individual is also not substantial. The

stop is often brief and uneventful. However, the Court held that the balance should to struck on the side of the motorist. In other words, it is not enough that a motorist is possibly lost to permit a police intrusion against the motorist. Additionally, the decision in Dunbar will not inhibit the police from making intrusions amounting to seizures when the governmental interest predominates—thus seizures even of lost motorists is justified ***when safety hazards are actually entailed*** and lights and siren are needed to arouse the attention of the drivers and avoid mishap." Furthermore, the Massachusetts Appeals Court cited with approval the case of **State v. Pinkham,** 565 A.2d 318 (Me. 1989), which states that "[p]olice officers do not violate the 4th AMD if they stop a vehicle when they have adequate grounds to believe the driver is ill or falling asleep."

Editor's Note: Lastly in **Commonwealth v. Canavan,** 40 Mass. App. Ct. 642 (1996), the Court stated that they would reject any seizure conducted by the police of merely a lost motorist. There must be elements concerning safety hazards or illness to make the stop in Massachusetts permissible under the community caretaking function.

MVs—Extrajurisdictional Stops for Misdemeanors (fresh pursuit)

Fresh and Continued Pursuit Law—c. 41 § 98A

G.L. c. 41, § 98A permits extraterritorial fresh pursuit arrests for any *arrestable offense*, whether it be a felony or misdemeanor, initially committed in the arresting officer's presence *and within his jurisdiction.*

Editor's Note: It provides, in part that : "A police officer of a city or town who is empowered to make arrests within a city or town may, ***on fresh and continued pursuit,*** exercise such authority in any other city or town for any offense committed in his presence within his jurisdiction for which he would have the right to arrest within his jurisdiction without a warrant."

The Type of Fresh and Continued Pursuit Required

The term "fresh and continued pursuit" as it relates a police officer's authority to effect a stop outside of his or her jurisdiction is often misunderstood. ***It does not mean refusing to stop.*** If that was the case, then every "fresh and continued pursuit" would be arrestable pursuant to c. 90 § 25 for refusing to submit. It should be looked at as merely a seizure which takes place when an officer engages the suspect vehicle by locking onto it by clearly signalling the vehicle to stop. If a police officer engages a motor vehicle in one jurisdiction and the stop occurs in another jurisdiction, the initial engagement must be based on reasonable suspicion that an arrestable offense has been committed.

Refusal to Stop for Plainclothes Officer Displaying Badge

In **Commonwealth v. Gray**, 423 Mass. 293 (1996), a Detective Joseph Deignan of the Watertown police department observed the defendant speeding in Watertown. The detective was in an unmarked cruiser. Using stobe lights and his horn, he pursued the vehicle and signalled the operator to stop. When the defendant failed to stop, the detective pulled alongside the vehicle and displayed his gold police badge by holding it in his hand and pressing it against the window. The defendant continued to drive until he was forced to stop by traffic in Waltham. In the course of a "pat-down" the detective discovered a bulge in the defendant's jacket containing 53.4 grams of cocaine. The Massachusetts Supreme Court held that the detective could lawfully pursue the defendant into Waltham from Watertown because it is an arrestable offense to fail to stop for a police officer. G.L. c. 90, §§ 21, 25. Therefore, the provisions of c. 41 § 98A were complied with.

MVs—Extrajurisdictional Stops for Misdemeanors (<u>no</u> fresh pursuit)

Stop Outside of Jurisdiction—Based on Properly Transferred Authority to Private Persons

In **Commonwealth v. Morrissey**, 422 Mass. 1 (1996), the Massachusetts Supreme Judicial Court held that an extrajurisdictional stop of an operator suspected of OUI was permissible where there was no fresh pursuit by the officer effecting the initial stop. In **Morrissey**, an officer of the West Boylston police department, officer Jeffery Stillings, requested the neighboring town of Sterling to send an officer [officer Scott McArthur] into West Bolyston to help render assistance in a police matter. On his way back to Sterling, officer McArthur observed a Buick automobile run a stop sign then veer to the right of the road and narrowly miss a telephone pole. McArthur reported these observations to Stillings., who then asked McArthur to effect a stop of this vehicle. McArthur did so within the West Bolyston town limits. Officer

Stillings then arrived at the scene of the stop and subsequently placed the operator under arrest for OUI. The defendant argued that McArthur had no legal police authority to conduct a stop in West Boylston for a misdemeanor. The SJC held that the stop was lawfully based on properly transferred authority from McArthur to Stillings.

Editor's Note On Transferred Jurisdiction: The SJC stated that under c. 37 § 13, a police officer "may require suitable aid in the execution of their office in a criminal case, in the preservation of the peace, [or] in the apprehending or securing of a person for a breach of the peace." Additionally, c. 268 § 24 states that "[w]hoever, being required in the name of the commonwealth by a sheriff, deputy sheriff, constable, police officer or watchman, neglects or refuses to assist him in the execution of his office in a criminal case, in the preservation of the peace or in the apprehension or securing of a person for a breach of the peace...shall be punished by a fine...or by imprisonment for not more than one month." The SJC stated that based on a reading of these statute, officer Stillings had statutory authority to request the assistance of officer McArthur. Also, if officer McArthur had refused, he would have been subject to criminal penalty.

Editor's Note On Lawfulness of the Stop: Having received McArthur's initial radio report concerning the erratic operation of the defendant's vehicle, officer Stillings had reason to believe that the crime of operating a motor vehicle while under the influence of intoxicating liquor was being committed in Stilling's territorial jurisdiction. Therefore, Stillings ***was authorized to stop the defendant to make an investigative inquiry.*** That authority was transferred to McArthur through Stilling's request for assistance.

Acting as a Private Person: In **Commonwealth v. Morrissey**, 422 Mass. 1 (1996), the SJC held that a requesting officer has statutory authority to request the assistance of any private person pursuant to these statutes. Once the requested assistance was conveyed to McArthur, he was authorized to make the stop, but he was still acting as a private citizen.

Editor's Note On c. 41 § 99: Since these requests did not emanate from the commanding officers, c. 41 § 99, which authorizes police powers outside of the jurisdiction, could not be utilized.

MVs—Extrajurisdictional Stops & Frisks

Effecting a Stop and Frisk Outside of Jurisdiction

A police officer's official authority is limited to the territorial jurisdiction of his or her appointment, unless the officer is engaged in fresh and continued pursuit or is acting under a warrant. There is no provision which permits a police officer outside of his or her territorial jurisdiction to simply conduct a stop and frisk based on reasonable suspicion that the person has, is, or is about to commit a crime. **Commonwealth v. Claiborne,** (1996).

Effecting a Stop and Frisk of Suspect Wanted by Foreign Agency on Reasonable Suspicion

In **Commonwealth v. Claiborne,** (1996), the Massachusetts Supreme Judicial Court addressed this issue. The Court stated that where officers within their territorial jurisdiction have reasonable suspicion based on specific and articulable facts that a suspect discovered within their jurisdiction committed a crime in another city or town, they may effect a stop and frisk of that individual. See also **United States v. Hensley,** 469 U.S. 221 (1985).

MVs—Extrajurisdictional Arrests for Felony (<u>no</u> fresh pursuit)

Felony Arrest Effected Outside of Jurisdiction With No Fresh Pursuit

In **Commonwealth v. Claiborne,** (1996), Brookline police officers effected the arrest of the defendant in the city of Boston. The defendant had committed a number of armed robberies in Brookline during the four weeks previous. Prior to the arrest, the Brookline officers observed the defendant operating in traffic. He was stopped. In side the vehicle police discovered a firearm used in the crimes and a black leather coat with a knit hat also worn by the suspect. Based on his personal description, the description of the vehicle and his direction of travel, the police had probable cause to believe that the suspect had committed the robberies. The Court held that since the Brookline police had probable cause to beleive that the defendant had committed the crimes, they could lawfully effect a citizen's arrest in the city of Brookline.

Editor's Note on Standard Required: When a police officer makes a warrantless arrest outside of his jurisdiction, and not in fresh and continued pursuit of the suspect within the meaning of c. 41 § 98A, then he acts as a private citizen, and the arrest will be held valid only if a private citizen would be justified in making the arrest under the same circumstances. A private citizen may lawfully arrest someone who has in fact committed a felony. Generally, the "in fact committed" element must be satisfied by a conviction.

Standard Relaxed to Probable Cause: In **Commonwealth v. Harris**, 11 Mass. App. Ct. 165, 170 (1981), the Appeals Court relaxed the requirements for a citizen's arrest where the arrest was made by police officers acting outside their territorial jurisdiction. In **Commonwealth v. Harris**, 11 Mass. App. Ct. 165, 170 (1981), the court noted that applying the "in fact committed" requirement to extraterritorial police officers acting responsibly would not further the purpose of the requirement: "to deter private citizens from irresponsible action." Instead, "rigid compliance" with the citizen's arrest rule in cases involving police officers in jurisdictions other than their own would only "frustrate legitimate law enforcement activities." Therefore, instead of requiring that the felony be "in fact committed," the **Harris** court stated that, to make a citizen's arrest, the officers needed only ***"probable cause to believe that a felony had been committed and that the person arrested had committed it."***

Editor's Note: Unlike the officer in **Commonwealth v. Morrissey,** 422 Mass. 1 (1996), the Brookline officers did not seek or receive authority from Boston police to pursue the defendant. Moreover, there is also no indication that Detectives McNeilly and Crapo were sworn in as special police officers in the city of Boston.

Felony Seizure of Evidence Admissible Where Police Act as Citizen With Probable Cause

In **Commonwealth v. Claiborne,** (1996), the Massachusetts Supreme Judicial Court concluded that the stop of the defendant by Brookline detectives in Boston did not require that evidence obtained as a result of the subsequent arrest and searches be suppressed. Therefore, even though the police were acting as citizens and did not have police powers, they could not only lawfully effect the defendant's arrest on probable cause, but they could also search for and seize incriminating evidence on probable cause.

MVs—The "Automobile Exception"

The Requirement of Exigent Circumstances [Federal]

In **United States v. Ross**, 456 U.S. 798 (1982), the Court strongly implied that "exigent circumstances" may no longer be required for police to justify a warrantless search of a motor vehicle stopped on a public way or found parked there when they have probable cause that the vehicle contains contraband or other evidence to a crime. In **Cardwell v. Lewis**, 417 U.S. 583 (1971) and in **Haefeli v. Chernoff**, 526 F.2d 1314 (1st Cir. 1975), the court held that the exigency requirement was satisfied just by the vehicle being located on a public way or street. In fact, in **Haefeli**, the Court held that exigent circumstances existed justifying the warrantless search of the automobile, even though both suspects had been arrested and the police investigation did not indicate that any confederates might approach and take the vehicle.

Editor's Note: Recently, in **Pennsylvania v. Labron**,116 S.Ct.____(1996), the United States Supreme Court held that "if a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth AMD permits police to search the vehicle without more." Even if the police department could secure the vehicle and subsequently obtain a search warrant, they are not required to do so. No exigent circumstances need be demonstrated by the police. The Court stated that since there is a reduced expectation of privacy in an automobile due to its pervasive regulation coupled with its ready mobility is itself "an exigency sufficient to excuse failure to obtain a search warrant once probable cause to conduct the search is clear."

The Requirement of Exigent Circumstances [Massachusetts]

However, in Massachusetts, exigent circumstances will be required. In **Commonwealth v. Sergienko**, 399 Mass. 29 (1987), the SJC held that there must have existed **at the time** of the seizure exigent circumstances to circumvent the warrant requirement.

Probable Cause Triggering From Radio Broadcast and Police Observations of Furtive Conduct Inside Vehicle

In **Commonwealth v. Heughan**, 40 Mass. App. Ct. 103 (1996), Boston police officers on routine patrol received a communication dispatch of gunfire occurring outside of the Area B-2 police station. While enroute to the scene of the reported gunfire, a second report of gunfire was reported by communications. The second report occurred within one minute of the first. The officers then headed to the location of the second report, surmizing that the shooters moved to that new location. The officers encountered a brown Toyota some 200 to 300 years from the second location of the reported gunfire. The vehicle was observed speeding at about fifty miles per hour in a thirty miles-per-hour zone. The officer pulled the Toyota over to the side of the roadway. An officer then observed a male occupant in the rear sent bend down out of sight. The officer then approached the driver and requested his license and registration. The operator could produce neither. Police then asked the operator to exit the vehicle. A second officer then noticed an open bottle of beer between the driver and passenger seats. The officer then entered the vehicle and made a cursory search which turned up a black 9 mm. firearm under the driver's seat. The other two occupants were then ordered from the vehicle. Back up officers then entered the passenger compartment of the vehicle and discovered a .22 caliber revolver. The three men were then placed under arrest for unlawful possession of firearms and transported to the police station where they were booked and processed. During a search of their persons occurring inside the police station, police discovered marijuana and crack cocaine on the persons of the defendants.

Editor's Note: The defendants moved to suppress the firearms and the narcotics on the basis that police had no legal justifiable reason to effect the initial search of the passenger compartment which uncovered the 9 mm. firearm under the driver's seat.

Editor's Note on Radio Broadcasts: The Court held that the police did not have either reasonable suspicion or probable cause for the stop of the motor vehicle merely based on the radio broadcasts concerning the gunfire.

Editor's Note on Initial Stop: However, the initial stop of the vehicle was permissible because the police observed a motor vehicle violation—speeding. The Court stated that the police "were duty bound to stop it."

Editor's Note on Probable Cause: After the stop the operator could not produce a license or registration. Additionally, the officers effecting the initial stop of the vehicle observed a passenger in the rear bend down out of sight—a motion, stated the Court, "that reasonably could be taken as placing or retrieving an object beneath the driver's seat. The Court stated that in light of the reported gunfire in the vicinity, "[t]he combination of events and observations ***gave the police officers probable cause*** to think that the [occupants] in the car were engaged in the commission of a crime, unlawful possession of weapons being one of several likely probabilities." Since the police had probable cause, the subsequent search which led to the discovery of the narcotics was permissible. Additionally, a full search of the motor vehicle and its contents would be permissible under the automobile exception rule pursuant to **Commonwealth v. Markou**, 391 Mass. 27 (1984) and **Commonwealth v. Lara**, 39 Mass. App. Ct. 546 (1995).

Scope—Prying Covers Off Dashboard

In **Commonwealth v. Lara,** 39 Mass. App. Ct. 546 (1995), the Court held that the police were "obliged to pry covers off the dashboard to find the incriminating material [narcotics]," under the automobile exception rule.

MVs—Probable Cause Based on Smell of Marijuana

Smell Triggers Probable Cause to Effect Search

In **Commonwealth v. Kitchens,** 40 Mass App. Ct. 591 (1996), police observed a van being operated without a registration plate. The van pulled into a Burger King lot. The officer pulled up behind the van and requested a license and registration from the operator, which he produced. The officer then asked the occupant for his license, which he produced. There were two additional occupants inside the van. While questioning the operator, the officer noticed a "very strong odor of burnt marijuana." The Court held that "the detection of a strong, fresh odor of burnt marijuana emerging from a motor vehicle provided probable cause to search the vehicle."

MVs—Warrantless Search Back at the Stationhouse

Alternatives Available to Police for Searching Motor Vehicle

If the police can demonstrate that the automobile was stopped on a public way or found parked there and that they have probable cause to believe that the vehicle contains contraband or other evidence of a crime they may:

(1) conduct the search at the scene, or
(2) start the search at the scene, discontinue it and finish it at the stationhouse, or
(3) remove the vehicle entirely from the scene and conduct the search back at the stationhouse

Constitutionally Permissible Back at the Stationhouse

Where police seize a motor vehicle from a public way on probable cause, they may conduct a warrantless search of it back at the stationhouse as long as the search is not long delayed after the initial seizure of the vehicle. In **Carroll v. United States,** 267 U.S. 132 (1925), the United States Supreme Court held that a search warrant is not required where there is probable cause to search an automobile stopped on a highway: an immediate search is constitutionally permissible. Subsequently, in **Chambers v. Maroney**, 399 U.S. 42 (1970), the United States Supreme Court held that if probable cause to search and exigent circumstances existed when the car was first stopped, the warrantless search would be constitutionally permissible even if it were carried out at the police station.

Exigency Does Not Have to Exist at the Stationhouse—Only at the Time of the Seizure

The element of exigent circumstances does not have to exist at the time of the search at the police station. As long as it exists at the time of the seizure, this element will be satisfied. The element of exigent circumstances will generally be satisfied as long as the motor vehicle is either stopped or found parked on a public way. It will not require the presence of an operator or passengers. The holding of **Chambers** allows the police to conduct a search that could have been done at the scene of the stop in the safety of the police station. It reflects the reality of police work: in some circumstances it may be necessary to delay a search until it can be done in a safe, convenient, and risk-free place. See**Commonwealth v. Markou,** 391 Mass. 27 (1984).

Attendant Risks Justify Procedure

Recently, in **Commonwealth v. Lara,** 39 Mass. App. Ct. 546 (1995), the Massachusetts Appellate Court upheld the seizure of a motor vehicle from a public way and the ensuing warrantless search conducted by police back at the stationhouse. The **Lara** Court looked to both **Chambers** and **Markou** is deciding the case. The Court stated that "[u]nderlying the **Markou** decision is the idea that if a search is constitutionally permissible on the street, with attendant risks (attempts to interfere with the search, exposure to traffic) and awkwardness (tools not at hand, obstruction of traffic), the occupants of the car are no worse off (i.e., suffer no greater intrusion) if the search is continued in the secure setting of the police station."

Weymouth Stationhouse Search of Vehicle Permissible Subsequent to Impoundment

Similarly, in **Commonwealth v. Bongarzone**, 390 Mass. 326 (1983), the Weymouth police impounded a Bronco from a public way where it was discovered containing over twenty pounds of marijuana. The vehicle was then removed to the Weymouth police station where the bags of marijuana were removed and weighed. The entire episode consumed less than two hours. The nonconsensual warrantless seizure was permissible under the automobile exception rule.

MVs—Request of License From Occupants Permissible

Request Requires No Legal Justification

In **Commonwealth v. Kitchens,** 40 Mass App. Ct. 591 (1996), a request made of an occupant of a lawfully stopped vehicle for his or her license amounts to "a routine inquiry that requires no justification."

MVs—Good Faith Exception Not Available Where Police Commit Error

Error Made by Police

In **Commonwealth v. Censullo,** 40 Mass. App. Ct. 65 (1996), police stopped a motor vehicle on the mistaken belief that the operator had committed a motor vehicle offense. The officer effecting the stop was unaware of a city ordinance modification permitting two way traffic on the street the subject was operating on. With the mistaken belief that the operator was operating the wrong way on a one-way street, the officer effected the stop. As a result of observations made by the officer after the stop, the operator was charged with operating under the influence of liquor. The Commonwealth argued that the initial stop was permissible since the officer has a good faith belief that a motor vehicle violation was occurring in his presence. The Massachusetts Appellate Court held that the good faith exception will not be available where the mistake is made by the police. Conversely, where the mistaken police action is based on a mistake caused by court personnel, the good faith exception will be available.

Error Made by Court Personnel and Not the Police

In **Arizona v. Evans,** 115 S.Ct. 1185 (1995), the United States Supreme Court applied the good faith exception where court personnel were responsible for a mistaken entry on the police computer indicating an outstanding warrant upon which police relied.

MV—Impoundment of Motor Vehicle

Impoundment of Vehicle Where None of the Occupants Can Supply Name of Owner

In **Commonwealth v. Sanchez,** 40 Mass. App. Ct. 411 (1996), the Court held police may lawfully impound a motor vehicle where, subsequent to a valid motor vehicle stop, none of the occupants could supply the name of the owner of the vehicle—even though the vehicle is not reported stolen through NCIC/LEAPS. The Court stated that due to reasons of security and safety, the impoundment was justified.

Towing Vehicles Out of Concern for Liability

In **Commonwealth v. Dunn,** 34 Mass. App. Ct. 702 (1993) the Court held that police may lawfully impound a vehicle where they could reasonably be concerned for their liability in exposing the vehicle to theft or vandalism—as well as the inconvenience to the property owner, if the vehicle were allowed to remain on the open lot. In **Dunn,** at approximately 10:00 p.m. on a Saturday night, the defendant [Dunn], driving in his pick-up truck, was stopped by the Southwick police for speeding. Instead of stopping his pickup on the side of the roadway, the defendant pulled his vehicle into the parking lot of a closed business, Computer, Inc., stopping it in a location that would not interfere with other vehicles entering or exiting from the parking lot. The defendant was arrested for OUI and transported to the station. One officer remained with the defendant's vehicle, called a tow truck to impound it, and searched the vehicle pursuant to a Southwick police regulation that called for an inventory search "where the operator is arrested or the vehicle towed or removed." In the driver's door pocket, the officer discovered a plastic bag containing marijuana and a smoking pipe. The defendant was subsequently charged with possession of 94C. The defendant filed a motion to suppress the evidence seized during the search of his truck. In effect, the defendant argued that the police had no right to impound his vehicle from the private parking lot of the closed business. The Court held that the police actions were proper and that the evidence was admissible pursuant to their police inventory policy.

Inventory of Impounded Vehicles

Additionally, in **Commonwealth v. Sanchez,** 40 Mass. App. Ct. 411 (1996), subsequent to the impoundment, the police conducted a motor vehicle inventory while awaiting the arrival of the tow truck at the scene of the stop. The police discovered cocaine in the pocket of a jacket drapped over the driver's seat. Since their inventory policy was containerized, the procedure was permissible.

Reasonable Alternative Arrangements to Move Vehicle

An argument that has recently been made in Massachusetts is whether under the State Constitution the police must have

written guidelines stating the circumstances in which an inventory search may be undertaken and thus restricting the exercise of police discretion. In **Commonwealth v. Caceres**, 413 Mass. 749 (1992), the defendant argued that the police should have allowed him to make an alternative arrangement to have the vehicle removed, either by having a passenger or friend remove the vehicle [and not the police]. Without expressly stating whether such an obligation on the police to do so before an inventory search can be deemed reasonable, footnotes #1 and #2 of the **Caceres** decision seem to indicate that the Massachusetts Supreme Judicial Court is leaning in that direction. Footnote #1 states that "[i]t would seem reasonably clear that the failure to give a person an opportunity to make reasonable alternative arrangements for the vehicle would not invalidate an inventory search under Fourth Amendment principles. **[Editor's note:** An article 14 argument may have a different outcome]. However, some State courts have indicated that the police must respond to a reasonable request for an alternative disposition of the vehicle." Similarly, in footnote #2, the Court cites with approval 3 ***W.R. LaFave, Search and Seizure*** § 7.3(c), @ 92 (2d ed. 1987), "if the driver asks that his car be turned over to a passenger, this should be done if the passenger is not under arrest or otherwise incapacitated and displays a valid operator's license." In addition, the SJC stated in the same footnote that "[a]t least, if the owner of the vehicle is present ***and*** makes such a proposal, *this principle seems appropriate."* The SOP at issue in **Caceres** stated that no inventory is to be taken:

(1) if the vehicle is legally parked and locked,
(2) removed by a third party,
(3) disabled and towed at the owner's or operator's request, or
(4) special conditions requiring prompt removal prevent the taking of an inventory before the vehicle is removed

No Reasonable Alternative Where Owner Unknown

In **Commonwealth v. Sanchez,** 40 Mass. App. Ct. 411 (1996), discussed above, since the owner of the vehicle was not identified, no reasonable alternative short of impoundment was available.

MVs—Police Failure to Notify Bail Magistrate Not a Violation of C. 263 § 5A

OUI Arrestee Must Affirmatively Invoke C. 263 § 5A

In **Commonwealth v. Christolini,** 422 Mass. 854 (1996), the police failed to notify the bail magistrate of an OUI arrest for approximately four hours. It was the policy of the Westfield police department to telephone the bail magistrate once every four hours. During the booking procedure, the defendant was informed of his rights pursuant to c. 263 § 5A. However, he did not affirmatively invoke them. The Massachusetts Supreme Judicial Court held that where an OUI-arrestee does not affirmatively invoke his rights to an independent medical examination pursuant to c. 263 § 5A, police failure to notify the bail magistrate within four hours of the arrest does not violate the statute.

Editor's Note on Imparting C. 263 § 5A: Whenever a person is placed in custody at a police station or other place of detention for operating under the influence of alcohol [and not drugs], he or she shall have the right, at his or her expense, to be examined immediately by a physician selected by him or her. This right shall be imparted to the arrestee by the police official in charge of the stationhouse or the booking officer immediately upon being booked. G.L. c. 263 § 5A. ***There shall be both oral and written notification.*** The arrestee shall be given a reasonable opportunity to exercise this right [by allowing access to telephone]. ***G.L. c. 263 § 5A states that:***

> "A person held in custody at a police station or other place of detention, charged with operating a motor vehicle while under the influence of intoxicating liquor, shall have the right, ***at his request and at his expense, to be examined immediately by a physician selected by him.*** The police official in charge of such station or place of detention, or his designees, shall inform him of such right immediately upon being booked, and shall afford him a reasonable opportunity to exercise it. Such person shall, immediately upon being booked, be given a copy of this section unless such a copy is posted in the police station or other place of detention in a conspicuous place to which such person has access." [emphsis added].

Arrestees Admitted to Bail Must Understand Nature and Conditions of Bail

In **Commonwealth v. Christolini,** 422 Mass. 854 (1996), the Massachusetts Supreme Judicial Court addressed Rule 28 of the Superior Court Rules Governing Persons Authorized to Take Bail. The Court stated that "it requires that persons admitted to bail understand the nature of bail and any conditions of release." Intoxication could impair the arrestee's

understanding of the bail proceeding, and could therefore, by a justifiable basis for extending the reasonable time delay before police must call or allow a defendant to call a bail magistrate.

Police May Decide to Delay Bail Hearing Due to Intoxication

In **Commonwealth v. Christolini,** 422 Mass. 854 (1996), the Massachusetts Supreme Judicial Court stated that the police themselves may make the determination whether the arrestee is intoxicated and unable to understand the nature and conditions of bail, therefore delaying the bail hearing. The Court stated that police departments often videotape booking procedures, which will give the judiciary ample basis to review subsequently a police determination as to the arrestee's intoxication.

Editor's Note: For these reasons, all police booking procedures should be subject to videotape.

Bail Hearing Delayed by Bail Magistrate

In **Commonwealth v. Finelli,** 422 Mass. 860 (1996), the OUI arrestee also received his rights pursuant to c. 263 § 5A but failed to affirmatively invoke them. He then agreed to take a breathalyzer examination where a reading of .14 was obtained. Police then telephoned the bail magistrate and explained to him that the defendant was intoxicated with a reading of .14. The bail magistrate told the officer to let the defendant "sleep it off" for five and half hours. At the end of that period, the bail magistrate came to the station and admitted the defendant to bail on personal recognizance.

Campus Police—Limited Powers of Arrest

Intro

Recently, in **Commonwealth v. Mullen,** 40 Mass. App. Ct. 404 (1996), the Massachusetts court of appeals severely restricted a campus police officer from effecting an arrest which developed from an initial motor vehicle stop—even if the motor vehicle stop was effected on a roadway running through the campus. In **Mullen**, a campus police officer from Fitchburg State College, observed a vehicle pull out of a street maintained by the college. This vehicle almost collided with the officer. The officer then turned his cruiser around and effected a stop of this vehicle. The operator was then placed under arrest for OUI.

The campus police officer stopped the defendant for failure to yield at an intersection, a civil motor vehicle infraction punishable only by a thirty-five dollar fine. G. L. c. 89, § 8. It is not an arrestable offense. **Commonwealth v. Zorilla**, 38 Mass. App. Ct. 77, 79 (1995). At the time he stopped the defendant, the campus police officer did not have reason to suspect that the defendant had committed an arrestable offense. It was only after the officer stopped the defendant and made observations concerning his sobriety that he discovered grounds to arrest the defendant for the arrestable offense of operating a motor vehicle under the influence of alcohol.

The SJC concluded that the campus police officer did not have authority to stop the defendant for a civil motor vehicle violation, therefore, the subsequent warrantless arrest cannot be justified by observations made following the stop.

Statutory Limitations on Campus Police Powers—c. 22C § 63

General Laws c. 22C, § 63, does not confer upon campus security staff all the powers of the State police officer appointed pursuant to c. 22C, § 10. On its face, G. L. c. 22C, § 63, confers upon those appointed thereunder by the colonel of the Massachusetts State police as special State police officers only "the same power to make arrests as regular police officers for any criminal offense committed in or upon lands or structures owned, used or occupied by such college."

Silence as to Motor Vehicle Powers

The statutory provisions of c. 22C, §§ 56 through 68, are all silent as to the authority, if any, of special State police officers appointed thereunder to enforce the civil motor vehicle laws on public ways within their respective jurisdictions.

Editor's Note: However, c. 90C, § 1 defines "police officer" narrowly to include "any officer . . . authorized to make arrest or serve criminal process, any person appointed by the registrar under section twenty-nine of chapter

ninety, any person appointed by the trustees of the University of Massachusetts under section thirty-two A of chapter seventy-five, any person appointed by the trustees of Southeastern Massachusetts university under section seventeen of chapter seventy-five B ***and any person appointed by the colonel of state police under section fifty-nine of chapter twenty-two C."***

Legal Procedures for Motor Vehicle Offenses

General Laws c. 90C details the procedures to be employed with regard to motor vehicle offenses. It is c. 90C, § 2, which authorizes a police officer to stop a motorist in order to issue a citation for automobile law violations. This section provides that "any police officer assigned to traffic enforcement duty" shall record the violation upon a citation. Section 3 provides that "If a police officer observes . . . the occurrence of a civil motor vehicle infraction, the officer may issue a written warning or may cite the violator for a civil motor vehicle infraction. . . ." To do so, the police officer must, of course, in many instances first stop the offender.

Definition of Police Officer

However, c. 90C, § 1 defines "police officer" narrowly to include "any officer . . . authorized to make arrest or serve criminal process, any person appointed by the registrar under section twenty-nine of chapter ninety, any person appointed by the trustees of the University of Massachusetts under section thirty-two A of chapter seventy-five, any person appointed by the trustees of Southeastern Massachusetts university under section seventeen of chapter seventy-five B ***and any person appointed by the colonel of state police under section fifty-nine of chapter twenty-two C."***

While virtually all special State police officers are empowered by c. 22C, §§ 56 through 68, to "make arrest" and/or "serve criminal process," we do not read c. 90, § 1, to encompass all such special State police officers within the definition of "police officer." Were this so, it would have been redundant and unnecessary for c. 90, § 1, expressly to include within the definition of "police officer" only those special State police officers appointed under c. 22C, § 59. Accordingly, we conclude that campus police officers, ***unlike those employed*** by the Department of Mental Health or Mental Retardation under c. 22C, § 59, ***are not empowered under c. 90C, § 2, to stop motorists for automobile law violations on public ways within their jurisdiction.***

1996/97 Statutory Updates & Statutes of Interest

C. 268 § 32B Resisting Arrest With a Police Officer

Recently, the Massachusetts Legislature enacted a statute making it a crime for a person to either resist or interfere with an arrest. Although the enactment does not carry a statutory power of arrest, police may effect an arrest if they can articulate a breach of the peace. *The statute reads:*

"A person commits the crime of resisting arrest if he knowingly prevents or attempts to prevent a police officer, acting under color of his official authority, from effecting an arrest of the actor or another by:

1) using or threatening to use physical force or violence against the police officer or another
or
1) using any other means which creates a substantial risk of causing bodily injury to such police officer or another"

Editor's Note on Breach of the Peace: It appears that if any of the above elements are satisfied, a breach of the peace has occurred. Conduct of "threatening to use or using physical force or violence" against a police officer is clearly a breach of the peace. Additionally, conduct which "creates a substantial risk of causing bodily injury" can easily be articulated that a breach of the peace has in fact occurred. Remember, that the crimes of assault, assault and battery, and assault and battery on a public official do not carry statutory powers of arrest, yet, police arrest for them every day ***because they are breaches of the peace.***

Attorney General's Newsletter—Power of Arrest for Resisting Arrest Based on a Breach of the Peace

In the Attorney General's newsletter of March 1996, it states that "[a]lthough the statute does not so provide, police officers are empowered to arrest individuals who are committing misdemeanors, including a breach of the peace, in their

presence. Therefore, because resisting arrest under the new statute is a misdemeanor, which by the very nature of the crime would always be committed in the officer's presence, the officer can arrest any individual, including a third party or bystander, without a warrant, for a violation of the new law."

C. 90 § 34P. Seizure of Registration Plates from Public or Private Property

The registrar after receipt of a notice as referred to in section thirty-four H, that a motor vehicle which is subject to the provisions of section one A and for which a motor vehicle liability policy or bond or deposit required by the provisions of this chapter has not been provided and maintained in accordance therewith, and upon the effective date of revocation pursuant to said section thirty-four H, shall notify state law enforcement agencies and the municipal police department of the city or town of principal garaging of said motor vehicle of such failure to provide and maintain said policy or bond or deposit. Further, such notice shall include the name and address of the owner of the motor vehicle and the address of the principal place of garaging.

State law enforcement personnel or the police of the city or town in which such motor vehicle is so garaged shall, upon receipt of said notice from the registrar seize the registration plates in use on said motor vehicle or when said registration plates are affixed to any vehicle or are in the possession or custody of any individual ***whether on a public way or private property*** and return them forthwith, unless the owner shall present a notice of reinstatement from the insurer or evidence of a new motor vehicle insurance policy dated at least two days prior to the effective date of revocation pursuant to section thirty-four H; provided, however, that municipal law enforcement agencies shall have the primary authority and responsibility to seize revoked registration plates within the limits of their jurisdiction; and, provided further, that no provision of this section shall prevent a state law enforcement official from seizing a revoked registration plate when in the performance of his duties.

C. 266 §§ 14, 15 Burglary—Victim's Spouse

The offense of burglary requires that the defendant have no right of habitation or occupancy in the premises at the time of the entry. The following factors should be used by the police when confronted with a situation where a defendant has broken into the dwelling of his or her spouse:

- the marital status of the parties
- the existence of any outstanding orders against the defendant [example: 209A]
- extended period of separation
- names on leases or documents of title
- any acknowledgements made by the defendant that he has no right to enter

C. 266 § 20 Larceny in a Building

Where a defendant steals goods from a store open for business, the proper charge will be either straight larceny pursuant to c. 266 § 30 or shoplifting under c. 266 § 30A, depending on the circumstances. It will not amount to larceny in a building under c. 266 § 20 since an element of that statute requires that the larceny be "from" the building. The longstanding caselaw in this Commonwealth requires that the stolen property be under the watch of the building, placed there for safekeeping, and not under the eye or personal care of some one in the building. **Commonwealth v. Sollivan,** 40 Mass. App. Ct. 284 (1996).

C. 266 § 37 Larceny by Check

In **Commonwealth v. Adelson,** 40 Mass. App. Ct. 585 (1996), the defendant could lawfully be convicted of the crime of larceny by check where he contacted an out of state vendor by telephone and had goods delivered to him in Massachusetts by mailing out a check intentionally written with insufficient funds.

C. 269 § 10 Dangerous Weapons—Ocean Not a Dangerous Weapon

In **Commonwealth v. Shea,** 38 Mass. App. Ct. 7 (1995), the Massachusetts Court of Appeals held that the ocean could not be a dangerous weapon. General Laws c. 265 § 15A, *reads, in pertinent part:*

"Whoever commits assault and battery upon another by means of a dangerous weapon shall be punished . . . ."

In **Shea**, the Court stated that "[a]lthough the ocean can be and often is dangerous, it cannot be regarded in its natural state as a weapon within the meaning of 15A. They stated that the term "dangerous weapon" comprehends "any instrument or instrumentality so constructed or so used as to be likely to produce death or great bodily harm." The cases in Massachusetts which discuss the definition share a common fact that is consistent with the definitions of "dangerous weapons" which speak in terms of "objects" or "instrumentalities." The commonality found in those cases is that the object in issue, whether dangerous per se or as used, was an instrumentality which the batterer controlled, either through possession of or authority over it, for use of it in the intentional application of force. Because the ocean in its natural state cannot be possessed or controlled, ***it is not an object or instrumentality capable of use as a weapon for purposes of 15A.***

C. 269 § 14A Harassing Telephone Calls—3 Calls Required

In **Commonwealth v. Wotan,** 422 Mass. 740 (1996), the Court held that "telephoning another person repeatedly, for the sole purpose of harassing, annoying or molesting such person or his family" requires proof of at least three telephone calls.

C. 272 §§ 35, 53 Lewd, Wanton & Lacivious Person—Public Place Element

In **Commonwealth v. Nicholas,** 40 Mass. App. Ct. 255 (1996), the defendant was arrested for being a lewd person and for committing unnatural and lacivious acts with another adult. The sexual acts were performed at dusk down a path approximately 100 feet from a rest area off of Route 95. The Court held that based on these facts, the defendant could not be convicted. For the area to qualify as public, as that term is required under the statutes, there must be a liklihood of being observed and that it was reasonably forseeable. The Court found that the place chosen to perform these acts was not likly to be used by others.

C. 272 § 53 Disorderly Person to wit: Peeping Tom

In **Commonwealth v. LePore,** (1996), the Court held that where a defendant peered inside of a window, he could lawfully be convicted of being a disorderly person to wit a Peeping Tom, even where the victim was asleep at the time of the surreptitious spying.

In **LePore**, the defendant argued that he could not be lawfully convicted of being a disorderly person because the victim, who was asleep, never knew he was there. Conduct that is disorderly by reason of its physically offensive nature ***does not, however, require that the object of the offensive conduct be aware of it.*** Acting the "Peeping Tom" offends and results in disorder by invading the privacy of persons precisely where they are most entitled to feel secure—where they live and rest. The transgression is completed by the violation of privacy just as a trespass may be completed even though the owner of property may not at the time of invasion have known of the presence of the trespasser on her property. LePore's conduct caused public inconvenience or alarm ***in that it occurred in a public alley.***

> **Editor's Note on "Peeping Tom"**—The term is an allusion to the Peeping Tom of Coventry, who popped out his head as the naked Lady Godiva passed, and was struck blind for it. Oxford English Dictionary 2113 (Compact ed. 1971). American Heritage Dictionary 1335 (3d ed. 1992).

Editor's Note on Voyeurism: The Court stated that "[a]n equation between voyeurism and disorderly conduct (i.e., being a disorderly person) is not self-evident. Voyeurism, in a dictionary sense and as used in the cases, connotes sexually offensive conduct, the idea apparently being that a man is unlikely to peer through somebody's window to size up the furniture. American Heritage Dictionary 2004 (3d ed. 1992). Disorderly conduct, as interpreted in **Alegata v. Commonwealth**, 353 Mass. at 303-304, "is not primarily, if at all, directed at offensive sexual conduct," but, rather, at intentional conduct that "disturb[s] the public tranquility, or alarm[s] or provoke[s] others." To be disorderly, within the sense of the statute, the conduct must disturb through acts other than speech; neither a provocative nor a foul mouth transgresses the statute. Compare **Commonwealth v. Richards**, 369 Mass. 443,447-448 (1976), in which the defendants punched police officers, who were making an arrest, and attracted an unruly crowd.

Statutes of Interest: The Law on Firearms in Massachusetts

C. 140 § 121 Definitions of Firearms

In section one hundred and twenty-two to one hundred and thirty-one F, inclusive, "firearm" shall mean a pistol, revolver or other weapon of any description, loaded or unloaded, from which a shot or bullet can be discharged and of which the length of the barrel is less than sixteen inches or eighteen inches in the case of a shotgun as originally manufactured, and the term "length of barrel" shall mean that portion of a firearm, rifle, shotgun or machine gun through which a shot or bullet is driven, guided or stabilized, ***and shall include the chamber.***

■**Sawed-Off Shotgun**
■A "sawed-off shotgun" shall mean any weapon made from a shotgun whether by alteration, modification or otherwise, if such a weapon, as modified has one or more barrels less than eighteen inches in length or a modified has an overall length of less than twenty-six inches.
■**Imitation Firearm**
■An "imitation firearm" shall mean any weapon which is designed, manufactured or altered in such a way as to render it in capable of discharging a shot or bullet.
■**Rifle**
■A "rifle" is a weapon having a rifled bore with a barrel length equal to or greater than sixteen inches, capable of discharging a shot or bullet for each pull of the trigger.
■**Shotgun**
■A "shotgun" is a weapon having a smooth bore with a barrel length equal to or greater than eighteen inches with an overall length equal to or greater than twenty-six inches, capable of discharging a shot or bullet for each pull of the trigger.
■**Ammunition**
■"Ammunition" shall mean cartridges or cartridge cases, primers (igniter), bullets or propellant powder designed for use in any firearm, rifle or shotgun. The term "ammunition" shall also mean tear gas cartridges, chemical mace or any device or instrument which contains or emits a liquid, gas, powder or any other substance designed to incapacitate.

C. 140 § 129B Firearm Identification Card; Disqualification of Applicants

Entitlement to FID [exceptions]
Any person residing or having a place of business within the jurisdiction of the licensing authority or any person residing in an area of exclusive federal jurisdiction located within a city or town may submit to the licensing authority application for a firearm identification card, ***which such person shall be entitled to, unless the applicant:***

(a) has within the last five years been convicted of a felony in any state or federal jurisdiction, or within that period has been released from confinement where such person was serving a sentence for a felony conviction, or
(b) has been confined to any hospital or institution for **mental illn**ess, except where the applicant shall submit with the application an affidavit of a registered physician that he is familiar with the applicant's history of mental illness and that in his opinion the applicant is not disabled by such illness in a manner which should prevent his possessing a firearm, rifle or shotgun, or
(c) has within the last five years been convicted of a violation of any state or federal narcotic or harmful drug law, or within that period has been released from confinement for such a conviction; or is or has been under treatment for or confinement for drug addiction or habitual drunkenness, except when he is deemed to be cured of such condition by a registered physician, he may make application for said card after the expiration of five years from the date of such confinement or treatment and upon presentation of an affidavit issued by said physician to the effect that the physician knows the applicant's history of treatment and that in his opinion the applicant is deemed cured, or
(d) is at the time of the application under the age of fifteen, or
(e) is at the time of the application fifteen years of age or over but under the age of eighteen, except where the applicant submits with his application a certificate of his parent or guardian granting the applicant permission to apply for a card, or
(f) is an alien, or
(g) is currently the subject of an order issued pursuant to Section Three B of Chapter Two Hundred and Nine A

The licensing authority may not prescribe any other condition for the issuance of a card and it shall within thirty days from the date of application either approve the application and issue the card or deny the application and notify the applicant of the reason for such denial in writing. Pending issuance of the card, a receipt for the fee paid shall, after five days from issuance, serve as a valid substitute, unless the applicant is disqualified. Written notice of denial of the application shall void the receipt and require its immediate surrender. A card may be revoked by the licensing authority or his delegate or suspended for such period as he may set, only upon the occurrence of any event which would have disqualified the holder from being issued the card. Any suspension or revocation of a card shall be in writing and shall state the reason therefor. Upon revocation or suspension, the licensing authority shall take possession of said card and receipt for fee paid for such card unless a hearing has previously been held pursuant to Section Three B of Chapter Two Hundred and Nine A.

Judicial Review

Any applicant or holder aggrieved by a denial, revocation or suspension of a card may within ninety days after receipt of notice appeal to the district court for a review of such action.

Forms

Said card shall be in a form prescribed by the commissioner and shall contain an identification number, the name and address of the holder, his place and date of birth, his height, weight, and hair and eye color, and his signature and shall be captioned "Firearm Identification Card". The application for a card shall be made in multiple on a form prescribed by the commissioner which shall require the applicant affirmatively to state that he is not disqualified for any of the foregoing reasons from possession of a card.

Validity

Said card shall be valid until revoked or suspended. The fee for an application and card shall be two dollars which shall be payable to the licensing authority and shall not be prorated or refunded in case of revocation or denial. The card holder shall notify, in writing, both the issuing authority and the commissioner of public safety of any change in his address. Such notification shall be made within thirty days of its occurrence.

Upon receipt of an application for a card, the licensing authority shall forward a copy of such application to the commissioner of public safety, who shall within twenty-one days advise in writing of any disqualifying criminal record, if any, of the applicant and whether there is reason to believe that the applicant is disqualified for any of the foregoing reasons from possessing a card. The licensing authority, when in doubt about the validity of the applicant's negative or positive statement relative to past hospitalization for mental disorder, may also make inquiries concerning the applicant to the department of mental health for the purpose of determining eligibility for the firearm identification card and shall receive prompt and full cooperation from such department for that purpose in any investigation of the applicant.

C. 140 § 129C Firearm Identification Card:Restrictions on Possession—Important Exemptions

No person, other than a licensed dealer or one who has been issued a license to carry a pistol or revolver or an exempt person as hereinafter described, shall own or possess any firearm, rifle, shotgun or ammunition unless he has been issued a firearm identification card by the licensing authority pursuant to the provisions of section one hundred and twenty-nine B.

No person shall sell, give away, loan or otherwise transfer a rifle or shotgun or ammunition other than:

(a) by operation of law, or
(b) to an exempt person as hereinafter described, or
(c) to a licensed dealer, or
(d) to a person who displays his firearm identification card, or license to carry a pistol or revolver.

A seller shall, ***within seven days,*** report all such transfers to the commissioner of public safety according to the provisions set forth in section one hundred and twenty-eight A, and in the case of loss, theft or recovery of any firearm, rifle, shotgun or machine gun, a similar report shall be made forthwith to both the commissioner and the licensing authority in the city or town where the owner resides.

The provisions of this section shall not apply to the following exempted persons and uses:

(a) Any device used exclusively for signalling or distress use and required or recommended by the United States Coast

Guard or the Interstate Commerce Commission, or for the firing of stud cartridges, explosive rivets or similar industrial ammunition;

(b) Federally licensed firearms manufacturers or wholesale dealers, or persons employed by them or by licensed dealers, or on their behalf, when possession of firearms, rifles or shotguns is necessary for manufacture, display, storage, transport, installation, inspection or testing;

(c) To a person voluntarily surrendering a firearm, rifle or shotgun and ammunition therefor to a licensing authority, the commissioner or his designee if prior written notice has been given by said person to the licensing authority or the commissioner, stating the place and approximate time of said surrender;

(d) The regular and ordinary transport of firearms, rifles or shotguns as merchandise by any common carrier;

(e) Possession by retail customers for the purpose of firing at duly licensed target concessions at amusement parks, piers and similar locations, provided that the firearms, rifles or shotguns to be so used are firmly chained or affixed to the counter and that the proprietor is in possession of a firearm identification card or license to carry firearms;

(f) Possession of rifles and shotguns and ammunition therefor by nonresident hunters with valid nonresident hunting licenses during hunting season;

(g) Possession of rifles and shotguns and ammunition therefor by nonresidents while on a firing or shooting range;

(h) Possession of rifles and shotguns and ammunition therefor by nonresidents traveling in or through the commonwealth, providing that any rifles or shotguns are unloaded and enclosed in a case;

(i) Possession of rifles and shotguns by nonresidents while at a firearm showing or display organized by a regularly existing gun collectors' club or association;

(j) Any new resident moving into the commonwealth, or any resident of the commonwealth upon being released from active service with any of the armed services of the United States with respect to any firearm, rifle or shotgun and ammunition therefor then in his possession, for sixty days after such release or after the time he moves into the commonwealth;

(k) Any person under the age of fifteen with respect to the use of a rifle or shotgun by such person in hunting or target shooting, provided that such use is otherwise permitted by law and is under the immediate supervision of a person holding a firearm identification card or a license to carry firearms, or a duly commissioned officer, noncommissioned officer or enlisted member of the United States Army, Navy, Marine Corps, Air Force or Coast Guard, or the National Guard or military service of the commonwealth or reserve components thereof, while in the performance of his duty;

(l) The possession or utilization of any rifle or shotgun during the course of any television, movie, stage or other similar theatrical production, or by a professional photographer or writer for examination purposes in the pursuit of his profession, providing such possession or utilization is under the immediate supervision of a holder of a firearm identification card or a license to carry firearms;

(m) The temporary holding, handling or firing of a firearm for examination, trial or instruction in the presence of a holder of a license to carry firearms, or the temporary holding, handling or firing of a rifle or shotgun for examination, trial or instruction in the presence of a holder of a firearm identification card, or where such holding, handling or firing is for a lawful purpose;

(n) The transfer of a firearm, rifle or shotgun upon the death of an owner to his heir or legatee shall be subject to the provisions of this section, provided that said heir or legatee shall within one hundred and eighty days of such transfer, obtain a firearm identification card or a license to carry firearms if not otherwise an exempt person who is qualified to receive such or apply to the licensing authority for such further limited period as may be necessary for the disposition of such firearm, rifle or shotgun;

(o) Persons in the military or other service of any state or of the United States, and police officers and other peace officers of any jurisdiction, in the performance of their official duty or when duly authorized to possess them;

(p) Carrying or possession by nonresidents of so-called black powder rifles, shotguns, and ammunition therefor as described in such paragraphs (A) and (B) of the third paragraph of section 121, and the carrying or possession of conventional rifles, shotguns, and ammunition therefor by nonresidents who meet the requirements for such carrying or possession in the state in which they reside.

(q) Any nonresident who is eighteen years of age or older when acquiring a rifle, shotgun or ammunition from a licensed firearms dealer, provided that such nonresident is in compliance with the law of the state where he resides and has the proper firearms license if required.

(r) Possession by a veteran's organization chartered by the Congress of the United States or included in clause (12) of section five of chapter forty and possession by the members of any such organizations when on official parade duty or ceremonial occasions;

(s) Possession by federal, state and local historical societies, museums, and institutional collections open to the public, provided such firearms, rifles or shotguns are unloaded, properly housed and secured from unauthorized handling;

(t) the possession of firearms, rifles, shotguns, machine guns and ammunition, by banks or institutional lenders, or their agents, servants or employees, when the same are possessed as collateral for a secured commercial transaction or as a

result of a default under a secured commercial transaction.

Any person, exempted by clauses (o), (p) and (q), purchasing a rifle or shotgun or ammunition therefor shall submit to the seller such full and clear proof of identification, including shield number, serial number, military or governmental order or authorization, military or other official identification, other state firearms license, or proof of nonresidence, as may be applicable.

Firearms, Rifles, Shotguns, and Ammunition Not to be Sold to Minors

Nothing in this section shall permit the sale of rifles or shotguns or ammunition therefor to a minor under the age of eighteen in violation of section one hundred and thirty nor may any firearm be sold to a minor nor to any person who is not licensed to carry firearms under section one hundred and thirty-one unless he presents a valid firearm identification card and a permit to purchase issued under section one hundred and thirty-one A, or presents such permit to purchase and is a properly documented exempt person as hereinbefore described.

The possession of a firearm identification card issued under section one hundred and twenty-nine B shall not entitle any person to carry a firearm in violation of section ten of chapter two hundred and sixty-nine.

Demand by Police of Identity and Licensing

Any person who, while not being within the limits of his own property or residence, or such person whose property or residence is under lawful search, and who is not exempt under this section, shall on demand of a police officer or other law enforcement officer, exhibit his license to carry firearms, or his firearm identification card or receipt for fee paid for such card, or, after January first, nineteen hundred and seventy, exhibit a valid hunting license issued to him which shall bear the number officially inscribed of such license to carry or card if any. Upon failure to do so such person may be required to surrender to such officer said firearm, rifle or shotgun which shall be taken into custody as under the provisions of section one hundred and twenty-nine D, except that such firearm, rifle or shotgun shall be returned forthwith upon presentation within thirty days of said license to carry firearms, firearm identification card or receipt for fee paid for such card or hunting license as hereinbefore described. Any person subject to the conditions of this paragraph may, even though no firearm, rifle or shotgun was surrendered, be required to produce within thirty days said license to carry firearms, firearm identification card or receipt for fee paid for such card, or said hunting license, failing which the conditions of section one hundred and twenty-nine D will apply. Nothing in this section shall prevent any person from being prosecuted for any violation of this chapter.

C. 140 § 131 License to Carry Pistol

Application

The chief of police or the board or officer having control of the police in a city or town, or the commissioner of public safety, hereinafter referred to as the commissioner, or persons authorized by them, respectively, ***shall upon request from a person residing or having a place of business within their respective jurisdiction,*** give an application for a license to carry firearms to such person. Said chief, board, officer or anyone authorized by them, respectively, shall within seven days of receipt of a completed application for such license, forward one copy of said applicant's fingerprints to said commissioner, who shall, within thirty days, advise, in writing, the licensing authority of the criminal record, if any, of the applicant.

Inquiry as to Mental Condition of Applicant

The licensing authority shall, when it has a reasonable belief that the applicant may have a history of mental, psychiatric or psychological illness which may affect his suitability to carry or possess a firearm, also make an inquiry concerning the applicant to the department of mental health within seven days of receipt of a completed application for such license. The commissioner of the department of mental health shall respond to a licensing authority within thirty days of receipt of an inquiry stating that based upon the information held by the department of mental health that the applicant is a suitable person to be licensed to possess or carry a firearm or is not a suitable person to be licensed to possess a firearm license.

Qualifications to be Issued Permit:

After such investigation has been completed, said chief, board, officer, commissioner of public safety, or anyone authorized by them, respectively, may, issue to a person residing or having a place of business within their respective jurisdiction, a license to carry firearms in the commonwealth if it appears that the applicant is a suitable person to be so licensed, and that the applicant has good reason to fear injury to his or her person or property, or for any other proper purpose, including the carrying of firearms for use in target practice only, ***except the following:***

1) an alien whose license to carry firearms may only be issued under the provisions of section one hundred and thirty-one F
2) a person who has been convicted of a felony or
3) the unlawful use, possession or sale of a narcotic or harmful drugs
4) a person who is currently the subject of an order issued pursuant to c. 209A § 3B
5) or a minor ***under the age of eighteen***

Notification of Denial
An applicant for a license or a renewal of a license under this section shall be notified by the licensing authority, in writing, within forty days of submitting said application, of either approval or denial and in the case of denial, such notice shall state the reasons thereof.

Judicial Review
Any person denied a license or a renewal of a license under this section, or any person who has not received a reply from the licensing authority within forty days of submitting said application, may, within either forty-five days of receiving notification of denial or within forty-five days after the expiration of the time limit in which the licensing authority is required to respond to the applicant, file a petition to obtain judicial review in the district court having jurisdiction in the city or town wherein the applicant filed for said license; and a justice of said court, after, having heard all of the facts, may direct that a license be issued the applicant, if he finds that there was no reasonable ground for refusing such license and that the applicant was not prohibited by law from holding the same.

Intentional False Answers
Any person who files an application with any intentional false answer to the questions on the application shall be punished by a fine of not less than five hundred nor more than one thousand dollars and by imprisonment for not less than six months nor more than two years in a jail or house of correction. [no statutory right of arrest].

Duration of LTC
A license issued to carry a firearm shall be for a period of five years, expiring on the anniversary of the applicant's date of birth occurring not less than four years but not more than five years from the date of issue. Any renewal thereof shall expire on the anniversary of the applicant's date of birth occurring not less than four years but not more than five years after the effective date of such license. Any license issued to an applicant born on February twenty-ninth, for the purpose of this section, shall expire on March first.

90 Day Grace Period
For the purposes of the provisions of section ten of chapter two hundred and sixty-nine, an expired license to carry firearms shall be deemed to be valid for a period not to exceed ninety days beyond the date of expiration, except that this provision shall not apply to any such license to carry firearms which has been revoked or relative to which revocation is pending.

The Fee
The fee for such license or a renewal of a license shall be ten dollars, and shall be payable in a manner prescribed by the licensing authority or commissioner of public safety and shall not be prorated or refunded in case of revocation. Notwithstanding other provisions of this section, no license shall be required for the possession or carrying of a firearm known as a detonator and commonly used on motor vehicles as a signaling and marking device, when carried or possessed for such signaling and marking purposes.

Violation
Whoever, knowingly, issues a license in violation of this section shall be punished by a fine of not less than five hundred nor more than one thousand dollars and by imprisonment for not less than six months nor more than two years in a jail or house of correction. [no statutory right of arrest.]

Judicial Review Upon Revocation
Any person whose license is so revoked, may within forty-five days of notification of said revocation, file a petition to obtain judicial review in the district court having jurisdiction in the city or town wherein the applicant held said license, and a justice of said court, after having heard all of the facts, may direct the license be reinstated if he finds that there was no reasonable ground for revoking said license.

No person shall be issued a license to carry or possess a machine gun in the commonwealth, except that a licensing authority may issue a machine gun license to:

(a) a firearm instructor certified by the criminal justice training council for the sole purpose of firearm instruction to police personnel;
(b) a bona fide collector of firearms upon application or upon application for renewal of such license.

C. 140 § 131C Carrying Firearm in Vehicle; Penalty

Elements of the Statute
1) no person carrying a firearm or firearms under a license issued under section one hundred and thirty-one, or one hundred and thirty-one F
2) shall carry the same in a vehicle
3) unless such firearm or firearms while so carried therein is under the direct control of such person

Penalty [fine]
Whoever violates the foregoing ***shall be punished by a fine of not more than one hundred dollars.*** A conviction of a violation of this section shall be reported forthwith by the court or magistrate to the authority who issued the license who shall immediately revoke the license of the person so convicted. No new license under said section shall be issued to any such person until one year after the date of revocation. There is no statutory right of arrest.

C. 140 § 131F 1/2 Temporary License to Carry During Certain Productions

Notwithstanding the provisions of subsection (a) of section ten of chapter two hundred and sixty-nine of the General Laws or any other law to the contrary, the carrying or possession of a firearm and blank ammunition therefor, during the course of any television, movie, stage or other similar theatrical production, by a person within such production, shall be authorized; provided, however, that such carrying or possession of such firearm shall be under the immediate supervision of a person licensed to carry firearms.

C. 140 § 131F Temporary License to Carry Firearms Issued to Non-Residents, etc.

A temporary license to carry firearms, or ammunition therefor, within the commonwealth, may be issued by the commissioner of public safety, or persons authorized by him, to a nonresident or any person not falling within the jurisdiction of a local licensing authority or to an alien which resides outside the commonwealth for purposes of firearms competition and subject to such terms and conditions as said commissioner may deem proper; provided, however, that no license shall be issued to a person convicted of a felony, or convicted of the unlawful use, possession or sale of narcotic or harmful drugs. Such license shall be valid for a period of one year but the commissioner may renew said license, if in his discretion such renewal is necessary. Temporary licenses issued under this section shall be marked **"Temporary License to Carry Firearms"**, and shall not be used to purchase firearms in the commonwealth as provided for in section one hundred and thirty-one E. The fee for said license shall be determined annually by the commissioner of administration under the provision of section three B of chapter seven. A license issued under the provisions of this section to a nonresident who is in the employ of a bank, public utility corporation, or a firm engaged in the business of transferring monies, or business of similar nature, or a firm licensed as a private detective under the provisions of chapter one hundred and forty-seven, and whose application is endorsed by his employer, or who is a member of the armed services and is stationed within the territorial boundaries of the commonwealth and has the written consent of his commanding officer, may be issued for any term not to exceed two years, and said licenses shall expire in accordance with the provisions of section one hundred and thirty-one.

A license, otherwise in accordance with provisions of this section, may be issued to a nonresident employee, whose application is endorsed by his employer, of a federally licensed Massachusetts manufacturer of machine guns to possess within the commonwealth a machine gun for the purpose of transporting or testing relative to the manufacture of machine guns, and the license shall be marked "temporary license to possess a machine gun" and may be issued for any term not to exceed two years and shall expire in accordance with the provisions of section one hundred and thirty-one.

C. 140 § 131G Certain Nonresidents Authorized to Carry Firearms

Any person who is not a resident of the commonwealth may carry a pistol or revolver in or through the commonwealth for the purpose of taking part in a pistol or revolver competition or attending any meeting or exhibition of any organized group of firearm collectors or for the purpose of hunting; provided, that such person is a resident of the United States and has a permit or license to carry firearms issued under the laws of any state, district or territory thereof which has licensing requirements which prohibit the issuance of permits or licenses to persons who have been convicted of a felony or who have been convicted of the unlawful use, possession or sale of narcotic or harmful drugs; provided, further, that in the case of a person traveling in or through the commonwealth for the purpose of hunting, he has on his person a hunting or sporting license issued by the commonwealth or by the state of his destination. Police officers and other peace officers of any state, territory or jurisdiction within the United States duly authorized to possess firearms by the laws thereof shall, for the purposes of this section, be deemed to have a permit or license to carry firearms as described in this section.

C. 140 § 131H Permit to Possess Firearms by Aliens

No alien shall own or have in his possession or under his control a firearm except as provided in section one hundred and thirty-one F or a rifle or shotgun except as provided in this section or section one hundred and thirty-one F. The commissioner of public safety may, after an investigation, issue a permit to an alien to own or have in his possession or under his control a rifle or shotgun; subject to such terms and conditions as said commissioner may deem proper. The fee for such permit shall be determined annually by the commissioner of administration under the provision of section three B of chapter seven. Upon issuing such permit said commissioner shall so notify, in writing, the chief of police or the board of officer having control of the police in the city or town in which such alien resides. Each such permit card shall expire at twelve midnight on December thirty-first next succeeding the effective date of said permit, and shall be revocable for cause by said commissioner. In case of revocation, the fee for such permit shall not be prorated or refunded. Whenever any such permit is revoked, said commissioner shall give notification as hereinbefore provided. The permit issued to an alien under this section shall be subject to sections one hundred and twenty-nine B and one hundred and twenty-nine C except as otherwise provided by this section.

Penalty M

Violation of any provision of this section shall be punished by a fine of not less than five hundred nor more than one thousand dollars, and by imprisonment for not more than six months in a jail or house of correction. If, in any prosecution for violation of this section, the defendant alleges that he has been naturalized, or alleges that he is a citizen of the United States, the burden of proving the same shall be upon him. Any firearm, rifle or shotgun owned by an alien or in his possession or under his control in violation of this section shall be forfeited to the commonwealth. Any such firearm, rifle or shotgun may be the subject of a search warrant as provided in chapter two hundred and seventy-six.

Power of Arrest

The director of law enforcement of the department of fisheries, wildlife and environmental law enforcement, deputy directors of enforcement, chiefs of enforcement, deputy chiefs of enforcement, environmental police officers and deputy environmental police officers, wardens as defined in section one of chapter one hundred and thirty-one and members of the state police in areas over which they have jurisdiction, and all officers qualified to serve criminal process ***shall arrest, without a warrant,*** any person found with a firearm, rifle or shotgun in his possession if they have reason to believe that he is an alien and if he does not have in his possession a valid permit as provided in this section.

C. 140 § 131I Possession of Altered License to Carry or Altered FID Card

Elements of the Statute:

1) whoever falsely makes, alters, forges or counterfeits
2) or procures or assists another to falsely make, alter, forge or counterfeit
3) a license to carry a firearm or a firearm identification card
or
1) whoever forges or without authority
2) uses the signature, facsimile of the signature
3) or validating signature stamp of the licensing authority or its designee
or
1) whoever possesses, utters, publishes as true
2) or in any way makes use of a

3) falsely made, altered, forged or counterfeited
4) license to carry a firearm or a firearm identification card

Penalty F

Violators shall be punished by imprisonment in a state prison for not more than five years or in a jail or house of correction for not more than two years, or by a fine of not less than five hundred dollars, or both such fine and imprisonment.

C. 140 § 131J Sale or Possession of Electrical Weapons; Penalty

Elements of the Statute:

1) no person shall sell, offer for sale or possess
2) a portable device or weapon
3) from which an electrical current, impulse, wave or beam may be directed
4) which current, impulse, wave or beam is designed to incapacitate temporarily, injure or kill

Penalty M

Whoever violates the provisions of this section shall be punished by a fine of not less than five hundred nor more than one thousand dollars or by imprisonment for not less than six months nor more than two years in a jail or house of correction, or both. There is no statutory right of arrest.

C. 269 § 10 Unlawfully Carrying Dangerous Weapons; Firearms; Etc.

Unlawful Carrying Elements of the Statute:

1) whoever, except as provided or exempted by statute
2) knowingly has in his possession
3) or knowingly has under his control in a vehicle
4) a firearm, loaded or unloaded, as defined in section one hundred and twenty-one of chapter one hundred and forty
5) without either:

a) being present in or on his residence or place of business; or
b) having in effect a license to carry firearms issued under section one hundred and thirty-one of chapter one hundred and forty [license to carry]; or
c) having in effect a license to carry firearms issued under section one hundred and thirty-one F of chapter one hundred and forty [nonresidents; temporary license to carry]; or
d) having complied with the provisions of sections one hundred and twenty-nine C [possess, own, transfer, etc; exemptions]and one hundred and thirty-one G of chapter one hundred and forty [nonresidents carrying firearms]; or
e) having complied as to possession of an air rifle or BB gun with the requirements imposed by section twelve B

Additional Unlawful Carrying Elements of the Statute:

1) whoever knowingly has in his possession
2) or knowingly has under control in a vehicle
3) a rifle or shotgun, loaded or unloaded
4) without either:

a) being present in or on his residence or place of business; or
b) having in effect a license to carry firearms issued under section one hundred and thirty-one of chapter one hundred and forty; or
c) having in effect a license to carry firearms issued under section one hundred and thirty-one F of chapter one hundred and forty; or
d) having in effect a firearms identification card issued under section one hundred and twenty-nine B of chapter one hundred and forty; or
e) having complied with the requirements imposed by section one hundred and twenty-nine C of chapter one hundred and forty upon ownership or possession of rifles and shotguns; or
f) having complied as to possession of an air rifle or BB gun with the requirements imposed by section twelve B

Penalty F

Violators shall be punished by imprisonment in the state prison for not less than two and one-half years nor more than

five years, or for not less than one year nor more than two and one-half years in a jail or house of correction. The sentence imposed on such person shall not be reduced to less than one year, nor suspended.

Qualified License in Effect for Hunting, Target Practicing, or Employment

No person having in effect a license to carry firearms for any purpose, issued under section one hundred and thirty-one or section one hundred and thirty-one F of chapter one hundred and forty shall be deemed to be in violation of this section.

FID Required for Residence or Business

The provisions of this subsection shall not affect the licensing requirements of section one hundred and twenty-nine C of chapter one hundred and forty which require every person not otherwise duly licensed or exempted to have been issued a firearms identification card in order to possess a firearm, rifle or shotgun in his residence or place of business.

Dangerous Weapons Elements of the Statute:

1) whoever, except as provided by law
2) carries on his person
3) or carries on his person or under his control in a vehicle
4) stiletto
5) dagger
6) or a device or case which enables a knife with a locking blade to be drawn at a locked position
7) any ballistic knife
8) or any knife with a detachable blade capable of being propelled by any mechanism
9) dirk knife
10) any knife having a double-edged blade
11) or a switch knife
12) or any knife having an automatic spring release device by which the blade is released from the handle, having a blade of over one and one-half inches
13) or a slung shot
14) blowgun
15) blackjack
16) metallic knuckles or knuckles of any substance which could be put to the same use with the same or similar effect as metallic knuckles
17) nunchaku
18) zoobow, also known as klackers or kung fu sticks, or any similar weapon consisting of two sticks of wood, plastic or metal connected at one end by a length of rope, chain, wire or leather
19) a shuriken or any similar pointed starlike object intended to injure a person when thrown
20) or any armband, made with leather which has metallic spikes, points or studs or any similar device made from any other substance
21) or a cestus or similar material weighted with metal or other substance and worn on the hand
22) or a manrikigusari or similar length of chain having weighted ends
or
1) whoever, when arrested upon a warrant for an alleged crime
2) or when arrested while committing a breach or disturbance of the public peace
3) is armed with or has on his person
4) or has on his person or under his control in a vehicle
5) a billy or other dangerous weapon other than those herein mentioned and those mentioned in paragraph (a)

Penalty F

Violators shall be punished by imprisonment for not less than two and one-half years nor more than five years in the state prison, or for not less than six months nor more than two and one-half years in a jail or house of correction, except that, if the court finds that the defendant has not been previously convicted of a felony, he may be punished by a fine of not more than fifty dollars or by imprisonment for not more than two and one-half years in a jail or house of correction.

Sawed-Off Shotgun/Machine Gun; Possessory Elements of the Statute:

1) whoever, except as provided by law
2) possesses a machine gun, as defined in section one hundred and twenty-one of chapter one hundred and forty
3) without permission under section one hundred and thirty-one of said chapter one hundred and forty
or

1) whoever owns, possesses or carries on his person, or carries on his person or under his control in a vehicle
2) a sawed-off shotgun, as defined in said section one hundred and twenty-one of said chapter one hundred and forty
3) without being the holder of a valid license to carry firearms issued in accordance with the provisions of said section one hundred and thirty-one of said chapter one hundred and forty

Penalty F
Violators shall be punished by imprisonment in the state prison for life, or for any term of years provided that any sentence imposed under the provisions of this paragraph shall be subject to the minimum requirements of subsection (a).

Additional Elements of the Statute:
1) whoever, within this commonwealth
2) produces for sale, delivers or causes to be delivered, orders for delivery, sells or offers for sale, or fails to keep records regarding, any rifle or shotgun
3) without complying with the requirement of a serial number, as provided in section one hundred and twenty-nine B of chapter one hundred and forty

Penalty M
Violators shall for the first offense be punished by confinement in a jail or house of correction for not more than two and one-half years, or by a fine of not more than five hundred dollars. There is no statutory power of arrest.

Section 10 of chapter 269 has been amended by modifying paragraph (h). The new inserted paragraph (h) now reads as follows:

New Section for 1996: Element Breakdown of Statute
1) whoever owns, possesses or transfers possession of a
2) firearm
3) rifle
4) shotgun or
5) ammunition
6) without complying with the requirements relating to firearms identification cards as provided in section one hundred and twenty-nine C of chapter one hundred and forty

Penalty M
Violators shall be punished by imprisonment in jail or house of correction for not more than two years or by a fine of not more than five hundred dollars. A second conviction of this paragraph shall be punished by imprisonment in a jail or house of correction for not more than two years or by a fine of not more than one thousand dollars or both.

Limitation
A violation of this subsection shall not be considered a lesser included offense to a violation of subsection (a), nor shall any one prosecute as a violation of this subsection the mere possession of a firearm, rifle, or shotgun by an unlicensed person not being present in or on his residence or place of business, nor shall the court allow an attempt to so prosecute.

Power of Arrest [in presence only]
A person committing a violation of this subsection may be arrested without a warrant by any officer authorized to make arrests.

Editor's Note: The limitation written into the law will preclude the prosecution from using this subsection instead of subsection (a), the mandatory one year commitment [5 year felony], for an unlawful carrying offense.

Additional Elements of the Statute:
1) whoever knowingly fails to deliver or surrender a revoked or suspended license to carry or possess firearms or machine guns
2) issued under the provisions of section one hundred and thirty-one or one hundred and thirty-one F of chapter one hundred and forty
3) or firearm identification card, or receipt for the fee for such card
4) or a firearm, rifle, shotgun or machine gun, as provided in section one hundred and twenty-nine D of chapter one hundred and forty

5) unless an appeal is pending

Penalty M
Violators shall be punished by imprisonment in a jail or house of correction for not more than two and one-half years or by a fine of not more than one thousand dollars. There is no statutory right of arrest.

Proscription Against Carrying on Campus
1) whoever, not being a law enforcement officer, and notwithstanding any license obtained by him under the provisions of chapter one hundred and forty
2) carries on his person a firearm as hereinafter defined, loaded or unloaded
3) or other dangerous weapon
4) in any building or on the grounds of any elementary or secondary school, college or university
5) without the written authorization of the board or officer in charge of such elementary or secondary school, college or university

Penalty M
Violators shall be punished by a fine of not more than one thousand dollars or by imprisonment for not more than one year, or both. There is no statutory right of arrest.

Editor's Note: For the purpose of the above paragraph, **"firearm"** shall mean any pistol, revolver, rifle or smoothbore arm from which a shot, bullet or pellet can be discharged by whatever means. Additionally, any officer in charge of an elementary or secondary school, college or university or any faculty member or administrative officer of an elementary or secondary school, college or university failing to report violations of this paragraph shall be guilty of a misdemeanor and punished by a fine of not more than five hundred dollars. There is also no statutory right of arrest for this violation.

Massachusetts Annotations:
In **Commonwealth v. Sampson**, 383 Mass. 750 (1981), the SJC held that a flare gun is not a firearm within the meaning of c. 140 § 121. In addition, a flare gun is exempted from the FID requirements by c. 140 § 129(a).Additionally, in **Commonwealth v. Sampson**, 383 Mass. 750 (1981), the SJC stated that "the proscription against carrying applies to working firearms only." See also **Commonwealth v. Dunphy**, 377 Mass. 453 (1979).

In **Commonwealth v. Rhodes,** 389 Mass. 641 (1983), the SJC held that BB-pistols are controlled exclusively by c. 269 § 12B and not c. 269 § 10(a). It excludes "any type of air gun" from the penalties of c. 269 § 10(a). Section 12B does not regulate the possession of an air gun by an adult. An adult in possession of an air gun cannot be in violation of c. 269 § 12B.

In **Commonwealth v. Fenton**, 18 Mass. App. Ct. 537 (1984), the Court held that a .22 caliber Crosman Model 38T CO2 revolver, is not controlled by c. 269 § 10(a), but by the air gun chapter of c. 269 § 12B.

C. 269 § 10C Use of Tear Gas Cartridges or MACE to Commit Crime

Elements of the Statute:
1) whoever uses tear gas cartridges
2) or any device or instrument
3) which contains a liquid, gas, powder, or any other substance
4) designed to incapacitate
5) for the purpose of committing a crime

Penalty F
Violators shall be punished by imprisonment in the state prison for not more than seven years.

C. 269 § 11B Possessing Firearm with Removed, Defaced Serial or ID

Elements of the Statute:
1) whoever, *while in the commission or attempted commission of a felony*
2) has in his possession or under his control

3) a firearm
4) the serial number or identification number of which has been removed, defaced, altered, obliterated or mutilated in any manner

Penalty F
Violators shall be punished by imprisonment in the state prison for not less than two and one half nor more than five years, or in a jail or house of correction for not less than six months nor more than two and one half years. Upon a conviction of a violation of this section, said firearm or other article, by the authority of the written order of the court, shall be forwarded to the commissioner of public safety, who shall cause said weapon to be destroyed.

C. 269 § 11C Removing Identification Number of Firearm

Elements of the Statute:
1) whoever, by himself or another
2) removes, defaces, alters, obliterates or mutilates in any manner
3) the serial number or identification number of a firearm
4) or in any way participates therein
or
1) whoever receives a firearm
2) with knowledge that its serial number or identification number
3) has been removed, defaced, altered, obliterated or mutilated in any manner

Penalty M
Violators shall be punished by a fine of not more than two hundred dollars or by imprisonment for not less than one month nor more than two and one half years. There is no statutory right of arrest.

Editor's Note: Possession or control of a firearm the serial number or identification number of which has been removed, defaced, altered, obliterated or mutilated in any manner shall be prima facie evidence that the person having such possession or control is guilty of a violation of this section; but such prima facie evidence may be rebutted by evidence that such person had no knowledge whatever that such number had been removed, defaced, altered, obliterated or mutilated, or by evidence that he had no guilty knowledge thereof. Upon a conviction of a violation of this section said firearm or other article shall be forwarded, by the authority of the written order of the court, to the commissioner of public safety, who shall cause said firearm or other article to be destroyed.

Power of Arrest:
There is no statutory right of arrest for this violations.

C. 269 § 12 Manufacturing Certain Dangerous Weapons

Elements of the Statute:
1) Whoever manufactures or causes to be manufactured
2) or sells or exposes for sale
3) *an instrument or weapon of the kind usually known as:*

a) a dirk knife
b) a switch knife or any knife having an automatic spring release device by which the blade is released from the handle, having a blade of over one and one-half inches
c) or a device or case which enables a knife with a locking blade to be drawn at a locked position
d) any ballistic knife
e) or any knife with a detachable blade capable of being propelled by any mechanism
f) slung shot
g) sling shot
h) bean blower
i) sword cane
j) pistol cane
k) bludgeon
l) blackjack

m) nunchaku
n) zoobow, also known as klackers or kung fu sticks, or any similar weapon consisting of two sticks of wood, plastic or metal connected at one end by a length of rope, chain, wire or leather
o) a shuriken or any similar pointed starlike object intended to injure a person when thrown
p) or a manrikiguasari or similar length of chain having weighted ends
q) or metallic knuckles or knuckles of any other substance which could be put to the same use and with the same or similar effect as metallic knuckles

Penalty M
Violators shall be punished by a fine of not less than fifty nor more than one thousand dollars or by imprisonment for not more than six months; provided, however, that sling shots may be manufactured and sold to clubs or associations conducting sporting events where such sling shots are used. ***There is no statutory right to arrest.***

C. 269 § 12A Sale to a Minor Under Eighteen of Air Rifle or BB Gun Penalized

Elements of the Statute:
1) whoever sells to a minor under the age of eighteen
2) or whoever, not being the parent, guardian or adult teacher or instructor
3) furnishes to a minor under the age of eighteen an air rifle or so-called BB gun

Penalty M
Violators shall be punished by a fine of not less than fifty nor more than two hundred dollars or by imprisonment for not more than six months. There is no statutory right of arrest.

C. 269 § 12B Possession by Minor Under Eighteen of Air Rifle or BB Gun Regulated

Elements of the Statute:
1) No minor under the age of eighteen shall have an air rifle or so-called BB gun in his possession
2) while in any place to which the public has a right of access
3) unless he is accompanied by an adult
4) ***or*** unless he is the holder of a sporting or hunting license ***and*** has on his person a permit from the chief of police of the town in which he resides granting him the right of such possession
or
1) no person shall discharge a BB shot, pellet or other object from an air rifle or so-called BB gun
2) into, from or across any street, alley, public way or railroad or railway right of way
or
1) no minor under the age of eighteen shall discharge a BB shot, pellet or other object from an air rifle or BB gun
2) unless he is accompanied by an adult or is the holder of a sporting or hunting license

Penalty M
Whoever violates this section shall be punished by a fine of not more than one hundred dollars, and the air rifle or BB gun or other weapon shall be confiscated. Upon a conviction of a violation of this section the air rifle or BB gun or other weapon shall, by the written authority of the court, be forwarded to the commissioner of public safety, who may dispose of said article in the same manner as prescribed in section ten. There is no statutory right of arrest.

C. 269 § 12D Carrying Rifle or Shotgun Loaded on Public Way Prohibited

Elements of the Statute:
1) no person shall carry on any public way
2) a rifle or shotgun
3) having shells or cartridges in either the magazine or chamber thereof
4) unless such person is engaged in hunting ***and*** is the holder of a valid license issued under sections six to nine, inclusive ***or*** section fifty-one of chapter one hundred and thirty-one

Penalty [power of arrest via statute] M
Whoever violates this section shall be punished by a fine of not less than fifty nor more than five hundred dollars, and may be arrested without a warrant. On a conviction of a violation of this section, said rifle or shotgun shall be confiscated

by the commonwealth, and on the authority of the written order of the court shall be forwarded to the commissioner of public safety, who may dispose of the same in the manner prescribed in section ten. This section shall not apply to the operation of a shooting gallery, licensed and defined under the provisions of section fifty-six A of chapter one hundred and forty, nor to persons using the same.

C. 269 § 12E Discharging a Firearm Within 500 Feet of a Dwelling

Elements of the Statute:
1) whoever discharges
2) a firearm as defined in section one hundred and twenty-one of chapter one hundred and forty
3) a rifle or shotgun
4) within five hundred feet of a dwelling
5) or other building in use
6) except with the consent of the owner or legal occupant thereof

Penalty M
Violators shall be punished by a fine of not less than fifty nor more than one hundred dollars or by imprisonment in a jail or house of correction for not more than three months, or both. There is no statutory right of arrest. However, if the circumstances give rise to a breach of the peace, an arrest may be effected under the common law.

Editor's Note: The provisions of this section shall not apply to:
(a) the lawful defense of life and property
(b) any law enforcement officer acting in the discharge of his duties
(c) persons using underground or indoor target or test ranges with the consent of the owner or legal occupant thereof
(d) persons using outdoor skeet, trap, target or test ranges with the consent of the owner or legal occupant of the land on which the range is established
(e) persons using shooting galleries, licensed and defined under the provisions of section fifty-six A of chapter one hundred and forty; and
(f) the discharge of blank cartridges for theatrical, athletic, ceremonial, firing squad, or other purposes in accordance with section thirty-nine of chapter one hundred and forty-eight

Statutes of Interest: Motor Vehicle Law

C. 85 § 11 Speeding; Arrest Without Warrant

Elements of the Statute

1) whoever violates an ordinance or by-law
2) prohibiting persons from riding or driving at a rate of speed inconsistent with public safety or convenience

Penalty M
Violators may be **arrested without a warrant** by an officer authorized to make **arrests** and kept in custody not more than twenty-four hours, Sunday excepted; and within such time he shall be brought before a proper magistrate and proceeded against according to law.

C. 85 § 16 Driver of Vehicle at Night to Give Name to Police Officer on Request

Every person shall while driving or in charge of or occupying a vehicle during the period from one hour after sunset to one hour before sunrise, when requested by a police officer, give his true name and address.

C. 85 § 17 Penalty for Violation of § 16

Whoever violates any of the provisions of section fifteen or section sixteen shall be punished by a fine of not more than five dollars. There is no statutory power of arrest. The driver or custodian of a vehicle shall be deemed to be the party responsible therefor and shall be liable to the foregoing penalty.

C. 89 § 1 Vehicles Meeting to Keep Right; Exceptions

Keeping to the Right of the Middle of the Roadway

When persons traveling with vehicles meet on a way, each shall seasonably drive his vehicle to the right of the middle of the traveled part of such way, so that the vehicles may pass without interference, except that the department of highways may modify such restriction by pavement markings on state highways, on ways leading thereto and on all main highways between cities and towns.

Crossing Solding Line to Enter or Exit a Private Way

The provisions of this section shall not be construed as prohibiting a vehicle from crossing a solid center pavement marking line or lines in making a left turn into or from a private way.

C. 89 § 2 Vehicle Passing in Same Direction to Keep Left; Exceptions

Keeping to the Left

Except as herein otherwise provided, the driver of a vehicle passing another vehicle traveling in the same direction shall drive a safe distance to the left of such other vehicle; and, if the way is of sufficient width for the two vehicles to pass, the driver of the leading one shall not unnecessarily obstruct the other.

Overtaken Vehicle Must Give Way

Except when overtaking and passing on the right is permitted, the driver of an overtaken vehicle shall give way to the right in favor of the overtaking vehicle on visible signal and shall not increase the speed of his vehicle until completely passed by the overtaking vehicle.

Passing Upon the Right Permitted

The driver of a vehicle may, if the roadway is free from obstruction and of sufficient width for two or more lines of moving vehicles, overtake and pass upon the right of another vehicle when the vehicle overtaken is:

(a) making or about to make a left turn
(b) upon a oneway street, or
(c) upon any roadway on which traffic is restricted to one direction of movement

C. 89 § 4 Vehicles to Keep to Right When View Obstructed

Keeping to the Right When View Obstructed

Whenever on any way, public or private, there is not an unobstructed view of the road for at least four hundred feet, the driver of every vehicle shall keep his vehicle on the right of the middle of the traveled part of the way, whenever it is safe and practicable so to do.[]., but, notwithstanding the foregoing provisions, every driver of a slow moving vehicle, while ascending a grade shall reasonably keep said vehicle in the extreme right-hand lane until the top of such grade has been reached.

C. 89 § 4A Driving in Single Lane on Multi-Lane Highway; Motorcycles

Divided Lanes

When any way has been divided into lanes, the driver of a vehicle shall so drive that the vehicle shall be entirely within a single lane, and he shall not move from the lane in which he is driving until he has first ascertained if such movement can be made with safety.

Motor Cycle Operation

The operators of motorcycles shall not ride abreast of more than one other motorcycle, shall ride single file when passing, and shall not pass any other motor vehicle within the same lane, except another motorcycle.

C. 89 § 4B Vehicles to Drive in Right-Hand Lane on Multi-Lane Highway

Driving to the Right

Upon all ways the driver of a vehicle shall drive in the lane nearest the right side of the way when such lane is available for travel, except when overtaking another vehicle or when preparing for a left turn. When the right lane has been con-

structed or designated for purposes other than ordinary travel, a driver shall drive his vehicle in the lane adjacent to the right lane except when overtaking another vehicle or when preparing for a left or right turn; provided, however, that a driver may drive his vehicle in such right lane if signs have been erected by the department of highways permitting the use of such lane.

C. 89 § 7 Right of Way of Fire Engines, Patrol Vehicles, and Ambulances

The members and apparatus of a fire department while going to a fire or responding to an alarm, police patrol vehicles and ambulances, and ambulances on a call for the purpose of hospitalizing a sick or injured person shall have the right of way through any street, way, lane or alley.

Penalty M

Whoever wilfully obstructs or retards the passage of any of the foregoing in the exercise of such right shall be punished by a fine of not more than fifty dollars or imprisonment for not more than three months. There is no statutory power of arrest.

C. 89 § 7A Regulation of Vehicles Near Fires or Emergency Sites

Approach of an Emergency Vehicle

Upon the approach of any fire apparatus, police vehicle, ambulance or disaster vehicle which is going to a fire or responding to call, alarm or emergency situation, every person driving a vehicle on a way shall immediately drive said vehicle as far as possible toward the right-hand curb or side of said way and shall keep the same at a standstill until such fire apparatus, police vehicle, ambulance or disaster vehicle has passed.

Driving Over Hose

No person shall drive a vehicle over a hose of a fire department without the consent of a member of such department.

No Driving Within 300 Feet of Fire Truck or Within 800 Feet of a Fire

No person shall drive a vehicle within three hundred feet of any fire apparatus going to a fire or responding to an alarm, nor drive said vehicle, or park or leave the same unattended, within eight hundred feet of a fire or within the fire lines established by the fire department, or upon or beside any traveled way, whether public or private, leading to the scene of a fire, in such a manner as to obstruct the approach to the fire of any fire apparatus or any ambulance, safety or police vehicle, or of any vehicle bearing an official fire or police department designation.

Towing Provisions

Authorized police or fire department personnel may tow a vehicle found to be in violation of the provisions of this section or which is illegally parked or standing in a fire lane as established by the fire department, whether or not a fire is in progress, and such personnel shall not be subject to the provisions of section one hundred and twenty D of chapter two hundred and sixty-six.

No Operation Behind Police, Fire or Ambulance Vehicles for 300 Feet

No person shall operate a motor vehicle behind any such fire apparatus, ambulance, safety or police vehicle, or any vehicle bearing an official fire or police department designation which is operating with emergency systems on, for a distance of three hundred feet.

Penalty [fine]

Violation of any provision of this section shall be punished by a fine of not more than one hundred dollars. There is no power of arrest

C. 89 § 7B Regulation of Emergency Vehicles

The driver of a vehicle of a fire, police or recognized protective department and the driver of an ambulance shall be subject to the provisions of any statute, rule, regulation, ordinance or by-law relating to the operation or parking of vehicles, except that a driver of fire apparatus while going to a fire or responding to an alarm, or the driver of a vehicle of a police or recognized protective department or the driver of an ambulance, in an emergency and while in performance of a public duty or while transporting a sick or injured person to a hospital or other destination where professional medical services are available, may drive such vehicle at a speed in excess of the applicable speed limit if he exercises caution and

due regard under the circumstances for the safety of persons and property, and may drive such vehicle through an intersection of ways contrary to any traffic signs or signals regulating traffic at such intersection if he first brings such vehicle to a full stop and then proceeds with caution and due regard for the safety of persons and property, unless otherwise directed by a police officer regulating traffic at such intersection. The driver of any such approaching emergency vehicle shall comply with the provisions of section fourteen of chapter ninety when approaching a school bus which has stopped to allow passengers to alight or board from the same, and whose red lamps are flashing.

C. 89 § 8 Right-of-Way at Intersections and Rotaries; Turns at Red Traffic Lights

When Operator on Left Must Yield to Operator on the Right

When two vehicles approach or enter an intersection of any ways, as defined in section one of chapter ninety, at approximately the same instant, the operator of the vehicle on the left shall yield the right-of-way to the vehicle on the right.

Yielding the Right of Way When Intending to Turn Left

Any operator intending to turn left, in an intersection, across the path or lane of vehicles approaching from the opposite direction shall, before turning, yield the right-of-way until such time as the left turn can be made with reasonable safety.

Yielding the Right of Way When Entering a Rotary

Any operator of a vehicle entering a rotary intersection shall yield the right-of-way to any vehicle already in the intersection. The foregoing provisions of this section shall not apply when an operator is otherwise directed by a police officer, or by a traffic regulating sign, device or signal lawfully erected and maintained in accordance with the provisions of section two of chapter eighty-five and, where so required with the written approval of the department of highways and while such approval is in effect.

Right Turn on Red

At any intersection on ways, as defined in section one of chapter ninety, in which vehicular traffic is facing a steady red indication in a traffic control signal, the driver of a vehicle which is stopped as close as practicable at the entrance to the crosswalk or the near side of the intersections or, if none, then at the entrance to the intersection in obedience to such red or stop signal, may make either **(1)** a right turn or **(2)** if on a one-way street may make a left turn to another one-way street, but shall yield the right-of-way to pedestrians and other traffic proceeding as directed by the signal at said intersection, except that a city or town, subject to section two of chapter eighty-five, by rules, orders, ordinances, or by-laws, and the department of highways on state highways or on ways at their intersections with a state highway, may prohibit any such turns against a red or stop signal at any such intersection, and such prohibition shall be effective when a sign is erected at such intersection giving notice thereof. Any person who violates the provisions of this paragraph shall be punished by a fine of not less than thirty-five dollars.

C. 89 § 9 Operation of MVs at Stop and Yield Signs;Traffic Control Devices

Designations by the State

The department of highways may designate any state highway or part thereof as a through way and may designate intersections or other roadway junctions with state highways at which vehicular traffic on one or more roadways should stop or yield and stop before entering the intersection or junction, and the department may, after notice, revoke any such designation. The department of highways on any state highway or part thereof so designated as a through way, or on any way where the department has designated, such way as intersecting or joining with a state highway, shall erect and maintain stop signs, yield signs and other traffic control devices.

Local Designation

The local authorities of a city or town authorized to enact ordinances or by-laws, or make rules, orders or regulations under the provisions of section twenty-two of chapter forty may in accordance with the provisions of section two of chapter eighty-five of the General Laws, including department approval when required, designate any way or part thereof under the control of such city or town as a through way and may designate intersections or other roadway junctions at which vehicular traffic on one or more roadways shall stop or yield and stop before entering the intersection or junction, ***and may, after notice and like department approval,*** when required, revoke any such designation. Such local authorities of a city or town having control of any way or part thereof so designated as a through way shall erect and maintain stop signs, yield signs and other traffic control devices at such designated intersections or junctions.

Stop Sign; Operator Must Stop

Except when directed to proceed by a police officer, every driver of a vehicle approaching a stop sign or a flashing red signal indication shall stop at a clearly marked stop line, but if none, before entering the crosswalk on the near side of the intersection, or, if none, then at the point nearest the intersecting roadway where the driver has a view of approaching traffic on the intersecting roadway before entering it. After having stopped, the driver shall yield the right of way to any vehicle in the intersection or approaching on another roadway so closely as to constitute an immediate hazard during the time when such driver is moving across or within the intersection or junction of roadways.

Yield Sign; Operator Must Yield

The driver of a vehicle approaching a yield sign shall in obedience to such sign slow down to a speed reasonable for the existing conditions and, if required for safety to stop, shall stop at a clearly marked stop line, but if none, before entering the crosswalk on the near side of the intersection, or, if none, then at the point nearest the intersecting roadway where the driver has a view of approaching traffic on the intersecting roadway before entering it. After slowing or stopping, the driver shall yield the right of way to any vehicle in the intersection or approaching on another roadway so closely as to constitute an immediate hazard during the time such driver is moving across or within the intersection or junction of roadways; provided, however, that if such a driver is involved in a collision with a vehicle in the intersection or junction of roadways, after driving past a yield sign without stopping, such collision shall be deemed prima facie evidence of his failure to yield the right of way.

Blocking Intersection

The driver of a motor vehicle shall not cross or enter an intersection, which it is unable to proceed through, without stopping and thereby blocking vehicles from travelling in a free direction. A green light is no defense to blocking the intersection. The driver must wait another cycle of the signal light, if necessary.

For the purposes of this section the word, "vehicle", shall include a trackless trolley.

Penalty [fine]

Any person violating the provisions of this section shall be punished by a fine not to exceed fifty dollars for each offense.

C. 89 § 10 Violation of One-Way Street Regulations; Effect on Civil Liability

The violation by the operator or driver of a motor or other vehicle of any rule, regulation, ordinance or by-law limiting traffic on any specified way to traffic moving in one direction shall not, in respect to any civil liability, render such operator or driver, or such vehicle or any occupant thereof, a trespasser upon said way.

C. 89 § 11 Regulation of Vehicles Approaching Pedestrians in Marked Crosswalks

Yielding to a Pedestrian in a Crosswalk

When traffic control signals are not in place or not in operation the driver of a vehicle shall yield the right of way, slowing down or stopping if need be so to yield, to a pedestrian crossing the roadway within a crosswalk marked in accordance with standards established by the department of highways if the pedestrian is on that half of the traveled part of the way on which the vehicle is traveling or if the pedestrian approaches from the opposite half of the traveled part of the way to within five feet of that half of the traveled part of the way on which said vehicle is traveling.

No driver of a vehicle shall pass any other vehicle which has stopped at a marked crosswalk to permit a pedestrian to cross, nor shall any such operator enter a marked crosswalk until there is a sufficient space beyond the crosswalk to accommodate the vehicle he is operating notwithstanding that a traffic control signal may indicate that vehicles may proceed.

Penalty [fine]

Whoever violates any provision of this section shall be punished by a fine of not more than one hundred dollars.

C. 90 § 6C. Repossessor of MV Required to Return Number Plates

Any person who takes possession of a motor vehicle by foreclosure or subrogation of title shall return the number plates issued for such vehicle to the person in whose name such plates had been issued as owner by the end of the second

day following the day on which such possession was taken.

Penalty [fine]

Whoever violates the provisions of this section shall be punished by a fine of not less than ten nor more than one hundred dollars.

C. 90 § 7E Red or Blue Oscillating Lights; Permit Requirement

No motor vehicle operated pursuant to section seven other than fire apparatus, ambulances, school buses, vehicles specified in section seven D used for transporting school children, and vehicles specified in section seven I shall mount or display a flashing, rotating or oscillating red light in any direction, except as herein provided; provided, however, that nothing in this section shall prohibit an official police vehicle from displaying a flashing, rotating or oscillating red light in the opposite direction in which the vehicle is proceeding or prohibit fire apparatus from displaying a flashing, rotating or oscillating blue light in the opposite direction in which the vehicle is proceeding.

Vehicles Permitted to Have Red Oscillating Lights

A vehicle owned or operated by a forest warden, deputy forest warden, a chief or deputy chief of a municipal fire department, a chaplain of a municipal fire department, a member of a fire department of a town or a call member of a fire department or a member or a call member of an emergency medical service may have mounted thereon flashing, rotating or oscillating red lights. Such lights shall only be displayed when such owner or operator is proceeding to a fire or in response to an alarm and when the official duty of such owner or operator requires him to proceed to said fire or to respond to said alarm, and at no other time.

Application for Red Light

No such red light shall be mounted or displayed on such vehicle until proper application has been made to the registrar by the head of the fire department and a written permit has been issued and delivered to the owner and operator. In the event that the operator is not the registered owner of the vehicle, no permit shall be issued until said owner forwards to the registrar a written statement certifying that he has knowledge that such red light will be mounted and displayed on said vehicle.

Permit to be Kept on Person on in the Vehicle

Any person operating a vehicle upon which flashing, rotating or oscillating red lights herein authorized are mounted shall have the permit for said lights upon his person or in the vehicle in some easily accessible place. Upon termination of the duties which warranted the issuance of the permit, the head of the fire department shall immediately notify the registrar who shall forthwith revoke such red light permit. Upon the written request of the chief of police or chief of fire of the town in which such permitted vehicle is registered, the registrar may revoke such permit. The registrar shall revoke such permit for the unauthorized use of such red lights and the owner and operator shall be subject to a fine as hereinafter provided.

Upon revocation, the registrar of motor vehicles shall notify forthwith the owner and operator of the vehicle for which such permit was issued and the head of the police department and fire department of the town in which his original permit was issued.

No motor vehicle or trailer except:

(i) a vehicle used solely for official business by any police department of the commonwealth or its political subdivisions or by any railroad police department or college or university police department whose officers are appointed as special state police officers by the colonel of state police pursuant to section sixty-three of chapter twenty-two C and subject to such special rules and regulations applicable to such college or university police department as the registrar may prescribe,

(ii) a vehicle owned and operated by a police officer of any town or any agency of the commonwealth while on official duty and when authorized by the officer's police chief or agency head and only by authority of a permit issued by the registrar,

(iii) a vehicle operated by a duly appointed medical examiner or a physician or surgeon attached to a police department of any city or town only while on official duty and only by authority of a permit issued by the registrar,

(iv) a vehicle operated by a police commissioner of a police department of any city only while on official duty and only by authority of a permit issued by the registrar,

(v) a vehicle actually being used for the transportation of persons who are under arrest, or in lawful custody under authority of any court, or committed to penal or mental institutions, and only by authority of a permit issued by the registrar,

(vi) a vehicle operated by a chaplain of a municipal police department while on official duty and only by authority of a permit issued by the registrar shall mount or display a flashing, rotating or oscillating blue light in any direction.

Application for Blue Light

No motor vehicle, as hereinbefore provided, requiring a permit from the registrar, shall mount or display a blue light on such vehicle until proper application has been made to the registrar by the head of the police department and such written permit has been issued and delivered to the owner and operator. Such notice shall include the place of residence and address of the owner and operator of the vehicle for which such permit is issued and the name of the make, vehicle identification number and the registration number of the vehicle for which such permit authorizes the display of blue lights.

Permit to be Kept on Person on in the Vehicle

Any person operating a vehicle upon which blue lights have been authorized to be mounted or displayed, by permit, shall carry such permit for said lights upon his person or in the vehicle in some easily accessible place. Upon termination of the duties of such person which warranted the issuance of the permit, the chief of police shall immediately notify the registrar, who shall forthwith revoke such blue light permit. Upon the written request of the chief of police of the town in which such permitted vehicle is registered the registrar may revoke such permit. The registrar shall revoke such permit for the unauthorized use of such blue lights and the owner and operator shall be subject to a fine as hereinafter provided. Upon revocation, the registrar of motor vehicle shall notify forthwith the owner and operator of the vehicle for which such permit was issued and the head of the police department of the city or town in which such permitted vehicle is registered. Upon receipt of his notice of revocation, such owner and operator shall forthwith deliver such blue light permit to the registrar and he shall not be eligible for reissuance of such permit without consent of the head of the police department of the town in which his original permit was issued. Nothing in this section shall authorize any owner or operator to disregard or violate any statute, ordinance, by-law, rule or regulation regarding motor vehicles or their use on ways of the commonwealth. The registrar may also make such rules and regulations governing or prohibiting the display of such other lights on motor vehicles as he may deem necessary for public safety.

Penalty [fine]

Any person who violates any provision of this section for which a penalty is not otherwise provided shall be subject to a fine of not less than one hundred dollars, nor more than three hundred dollars.

C. 90 § 7R1/2 Placement of Seller's Insignia on Motor Vehicle; Consent of Buyer

No seller, or an agent or employee of a seller, of motor vehicles shall place on a motor vehicle an insignia, logo or other plate that advertises the name of the seller without first having obtained the written consent of the buyer of such motor vehicle. Such seller must provide a buyer with a written consent form at the time of the purchase of the motor vehicle. The original of such written consent form shall be retained by the seller and a copy retained by the buyer. Any such seller's failure to obtain written consent from the buyer shall enable the buyer to request that the seller remove any insignia, logo or plate and make all repairs necessary to restore the motor vehicle to its original condition. Each seller shall post in a conspicuous place, a notice explaining the buyer's rights under this section. Any violation of this section shall be punishable by a fine of not less than two hundred dollars.

C. 90 § 7AA Child Passenger Restraints; Mandatory Use; Exceptions

Child Five Years or Less

No child five years old or less shall ride as a passenger in a motor vehicle on any way unless said child is wearing a safety belt which is properly adjusted and fastened or unless such child is properly fastened and secured by a child passenger restraint as defined in section one.

Between Five and Twelve

No child who is older than five years of age but not older than twelve years of age shall ride as a passenger in a motor vehicle on any way unless said child is wearing a safety belt which is properly adjusted and fastened.

The provisions of this section shall not apply to any such child who is:

(1) riding as a passenger in a motor vehicle in which all seating positions equipped with safety belts or child passenger restraints are occupied by other passengers who are using said restraints;
(2) riding as a passenger in a motor vehicle used to transport passengers for hire;
(3) riding as a passenger in a motor vehicle not equipped with safety belts;
(4) physically unable to use safety belts or child passenger restraints.

Penalty [fine]
Any operator of a motor vehicle who violates the provisions of this section shall be subject to a fine of not more than twenty-five dollars; provided, however, that such fine may be waived if the court is satisfied that the defendant has purchased a child passenger restraint as defined in section one.

Evidence Cannot Be Used in a Contributort Negligence Action
A violation of this section shall not be used as evidence of contributory negligence in any civil action.

C. 90 § 8 Licenses to Operate Motor Vehicles; Application Procedure

Application Procedures for License
Application for a license to operate motor vehicles may be made by any person except a person who has been licensed and whose license is not in force because of revocation or suspension or whose right to operate is suspended by the registrar; but before such a license is granted, the applicant shall pass such examination as to his qualifications as the registrar, without discriminating as to age, shall require; ***and no license shall be issued until the registrar or his authorized agent is satisfied that the applicant is a proper person to receive it;*** and, except as hereinafter provided, no such license shall be issued to any person under eighteen years of age. Each applicant shall submit with his application a birth, baptismal or school certificate or such other satisfactory evidence of his age as the registrar may require. Each applicant shall state his military status in such application, and the registrar shall record such status in the central computer system of the registry.

Junior Operator's License
A junior operator's license may, under rules and regulations established by the registrar, be issued to a minor under eighteen years of age who has attained age seventeen and such a license may be issued to a person under seventeen years of age if he is at least sixteen and one half years of age ***and has successfully completed a driver education and training course approved by the registrar.***

Junior Operator's License—Cannot Operate Between 1:00 a.m. and 4:00 a.m. Unless Accompanied by Parent
Such license shall not entitle a licensee under eighteen years of age to operate a motor vehicle between the hours of one o'clock ante meridian and four o'clock ante meridian unless accompanied by a parent or legal guardian.

Deemed Operating Without a License
The extent to which a holder of a junior operator's license may operate a motor vehicle thereunder shall be printed on each such license and any holder of such a license who operates a motor vehicle otherwise than as indicated on his license shall be deemed to be operating a motor vehicle without being duly licensed under this chapter.

Receipt in Lieu of License
If for any reason the registrar or his agents are unable to examine an applicant for a license promptly, the applicant may be issued a receipt for the fee paid, provided that the applicant shows that he is duly licensed in a state or country which state or country the registrar has finally determined prescribes and enforces standards of fitness for operators of motor vehicles substantially as high as those prescribed and enforced by this commonwealth. Said receipt shall be carried in lieu of the license, and for a period of sixty days from the date of its issue said receipt shall have the same force and effect given to the license by this chapter.

To each licensee shall be assigned some distinguishing number or mark, and the licenses issued shall be in such form as the registrar shall determine. They may contain special restrictions and limitations. They shall contain a photograph of the licensee, the distinguishing number or mark assigned to the licensee, his name, his place of residence and address, a brief description of him for purposes of identification, and such other information as the registrar shall deem necessary.

The photographs of licensees appearing on all operator's licenses shall be a straightforward looking view of the licensee with a distinctive license for persons under the age at which they can purchase alcoholic beverages as defined by section thirty-four of chapter one hundred and thirty-eight.

A person to whom a license has been issued under this section shall not operate motor vehicles other than those for which such license has been made valid by the registrar. All operators of motor vehicles and trailers which are regarded as registered under a general distinguishing number or mark as provided in section five and motor vehicles and trailers owned and operated by the commonwealth or any of its political subdivisions shall be subject to the rules and regulations establishing classifications for operator's licenses. In absence of a registered gross weight for such vehicle or trailer, the gross vehicle weight rating as established by the original manufacturer of the chassis shall be used to determine the class of license required to operate the aforementioned motor vehicles and trailers.

Every person licensed to operate motor vehicles as aforesaid shall endorse his name in full in a legible manner on the margin of the license, in the space provided for the purpose, immediately upon receipt of said license, and such license shall not be valid until so endorsed.

Every person licensed to operate motor vehicles as aforesaid shall report to the registrar every change in his military status, and the registrar shall record such change in status in the central computer system of the registry.

A license or any renewal thereof issued to an operator shall expire on an anniversary of the operator's date of birth occurring more than twelve months but not more than sixty months after the effective date of such license. The license issued to an operator born on February twenty-ninth shall, for the purpose of this section, expire on March first.

Applications for licenses shall be in such form as may be prescribed by the registrar. Every application for an original license filed under this section shall be sworn to by the applicant before a justice of the peace or notary public and, if the applicant is under age eighteen, be accompanied by the written consent, in such form as the registrar shall determine, of a parent or guardian or other person standing in the place of a parent of the applicant.

An applicant for a license under this section shall be required to answer questions on the examination to determine the applicant's knowledge of the laws regarding operating a motor vehicle while under the influence of alcoholic beverages, including the relevant sections of this chapter and chapter one hundred and thirty-eight. The registrar shall determine the nature and number of such questions.

C. 90 § 8B Learner's Permit; Liability of Licensed Operator Accompanying Learner

Appicants for Learner's Permit
Any person who is at least sixteen years of age, excepting persons who have been licensed and whose licenses are not in force because of revocation or suspension, and persons whose right to operate is suspended by the registrar, may apply to the registrar for a learner's permit.

Satisfactory Age
Each applicant shall submit with his application a birth, baptismal or school certificate or such other satisfactory evidence of his age as the registrar may require.

Learner's Permit Entitlements
The registrar, in his discretion, after the applicant has successfully passed all parts of the examination other than the driving test, may issue to the applicant a learner's permit which shall entitle him, while having such permit in his immediate possession:

a) to drive a motor vehicle upon any way when accompanied by an operator
b) duly licensed by his state of residence
c) who is eighteen years of age or over
d) who has had at least one year of driving experience, and
e) who is occupying a seat beside the driver

Motorized Bicycles
In the case of a motorized bicycle, no such accompanying operator shall be required.

No Riders; No Operation Between Sunsey and Sunrise

Additionally, if the applicant has been issued a learner's permit restricted to the operation of a motorcycle, said learner's permit shall not entitle him to carry any passenger while operating such motorcycle upon any way or to operate a motorcycle upon any way at any time after sunset or before sunrise.

No such motorcycle learner's permit which has expired shall be renewed unless the applicant successfully passes such parts of the examination other than the driving test as the registrar may require; and unless said applicant has taken at least one driving test during the period when the learner's permit was valid. If such applicant fails the driving test twice he shall be required to successfully complete a course of study at an approved rider training school as provided for in section fifteen of chapter twenty-two, prior to scheduling a subsequent driving test. Such licensed operator shall be liable for the violation of any provision of this chapter, or of any regulation made in accordance herewith, committed by such persons with a learner's permit; provided, however, that an examiner in the employ of the registrar, when engaged in his official duty, shall not be liable for the acts of any person who is being examined by said examiner. Any such learner's permit shall be valid for one year from the date of issue or until the holder shall have received a license to operate, whichever first occurs.

Learner's Permit Operation—No Operation Between 1:00 a.m. and 5:00 a.m.

If the applicant is under eighteen years of age, said learner's permit shall not entitle him to operate a motor vehicle between the hours of one o'clock ante meridian and five o'clock ante meridian, unless:

a) he is accompanied by his parent or legal guardian
b) who is a licensed operator
c) with at least one year of driving experience and
d) whose license or right to operate is not revoked or suspended

C. 90 § 8E Identification Cards for Persons Without Valid Operator's Licenses

Any person eighteen years of age or older who does not have a valid license to operate motor vehicles may make application to the registrar of motor vehicles and be issued an identification card by the registrar and attested by the registrar as to true name, correct age, photograph and other identifying data as the registrar may require. Every application for an identification card shall be signed and verified by the applicant before a person authorized to administer oaths and shall contain such bona fide documentary evidence of the age and identity of such applicant as the registrar may require. The registrar shall require payment of a fee, to be determined annually by the commissioner of administration under the provision of section three B of chapter seven at the time application for an identification card is made.

C. 90 § 8H Unlawful Use of Identification Cards

No person shall:

(a) display, cause or permit to be displayed, or have in his possession, any canceled, fictitious, fraudulently altered, or fraudulently obtained identification card;
(b) lend his identification card to any other person or knowingly permit the use thereof by another;
(c) display or represent any identification card not issued to him as being his card;
(d) permit any unlawful use of an identification card issued to him;
(e) photograph, photostat, duplicate, or in any way reproduce any identification card or facsimile thereof in such a manner that it could be mistaken for a valid identification card, or display or have in his possession any such photograph, photostat, duplicate, reproduction, or facsimile unless authorized by the provisions of this chapter.

C. 90 § 9 Operation of Unregistered or Improperly Equipped Motor Vehicles

No person shall operate, push, draw or tow any motor vehicle or trailer, and the owner or custodian of such a vehicle shall not permit the same to be operated, pushed, drawn or towed upon or to remain upon any way except as authorized by section three, ***unless such vehicle is registered*** in accordance with this chapter and carries its register number displayed as provided in section six, and, in the case of a motor vehicle, is equipped as provided in section seven.

A motor vehicle which is being towed or drawn by a motor vehicle designed to draw or tow such vehicles need not be

so registered if :

(a) the towing vehicle is properly registered and displays a valid repair plate issued pursuant to section five
(b) said towing vehicle maintains insurance which also provides coverage for the motor vehicle being towed, and
(c) said towing vehicle has been issued a certificate by the department of public utilities pursuant to paragraph **(b)** of section three of chapter one hundred and fifty-nine B.

Agricultural Purposes or Industrial Purposes

A tractor, trailer or truck may be operated without such registration upon any way for a distance not exceeding one half mile, if said tractor, trailer or truck is used exclusively for agricultural purposes or between one-half mile and two miles if said tractor, trailer or truck is used exclusively for agricultural purposes and the owner or lessee of said tractor, trailer or truck has filed with the registrar of motor vehicles a liability policy or bond in compliance with the provisions of this chapter, or for a distance not exceeding three hundred yards, if such tractor, trailer or truck is used for industrial purposes other than agricultural purposes, for the purpose of going from property owned or occupied by the owner of such tractor, trailer or truck to other property so owned or occupied.

New M/V Delivered to Dealer

A new automobile being delivered to a dealer by means of a tractor and trailer may be unloaded on a public way and driven by the person so delivering or his agents or servants without such registration to a dealer's premises over a public way for a distance not exceeding three hundred feet provided that the person so delivering, with respect to such new automobile, shall have filed with the registrar a motor vehicle liability policy or bond in compliance with the provisions of this chapter.

Golf Cart

A motor vehicle designed for the carrying of golf clubs and not more than four persons may be operated without such registration upon any way if such motor vehicle is being used solely for the purpose of going from one part of the property of said golf course, provided that the owner of such motor vehicle shall have filed with the registrar a public liability policy or bond providing for the payment of damages to any person to the amount provided by section thirty-four A due to injuries sustained as a result of the operation of such vehicle.

M/V Owned by Cemetery

A motor vehicle owned by a cemetery may be operated without such registration upon any way if such motor vehicle is being used solely for the purpose of going from one part of the property of a cemetery to another part of the property of said cemetery, provided that such vehicle shall not travel more than one mile on any public way and the owner of such motor vehicle shall have filed with the registrar a public liability policy or bond providing for the payment of damages to any person to the amount provided by section thirty-four A due to injuries sustained as a result of the operation of such vehicle.

Earth-Moving Vehicle

An earth-moving vehicle used exclusively for the building, repair and maintenance of highways which exceed the dimensions or weight limits imposed by section nineteen and the weight limits imposed by section thirty of chapter eighty-five may be operated without such registration for a distance not exceeding three hundred yards on any way adjacent to any highway or toll road being constructed, relocated or improved under contract with the commonwealth or any agency or political subdivision thereof or by a public instrumentality, provided that a permit authorizing the operation of such a vehicle in excess of the stated weight or dimension limits has been issued by the commissioner of highways or the board or officer having charge of such way, and provided that such earth-moving vehicle shall be operated under such permit only when directed by an officer authorized to direct traffic at the location where such earth-moving vehicle is being operated. The operation of such an earth-moving vehicle shall conform to any terms or conditions set forth in such permit, and any person to whom any such permit is issued shall provide indemnity for his operation by means of a motor vehicle liability policy or bond conforming to the requirements of this chapter and shall furnish a certificate conforming to the requirements of section thirty-four A with each such application for a permit.

Violation of this section shall not be deemed to render the motor vehicle or trailer a nuisance or any person a trespasser upon a way and shall not constitute a defense to, or prevent a recovery in, an action of tort for injuries suffered by a person, or for the death of a person, or for damage to property, unless such violation by the person injured or killed or sustaining the damage was in fact a proximate cause of such injury, death or damage, but violation of this section shall be deemed evidence of negligence on the part of the violator.

A motor vehicle or trailer shall be deemed to be registered in accordance with this chapter notwithstanding any mistake in so much of the description thereof contained in the application for registration or in the certificate required to be filed under section thirty-four B as relates to the type of such vehicle or trailer or to the identifying number or numbers required by the registrar or any mistake in the statement of residence of the applicant contained in said application or certificate.

Penalty M
A person convicted of a violation of this section shall be punished by a fine of not more than one hundred dollars for the first offense and not more than one thousand dollars for any subsequent offense. There is no power of arrest.

C. 90 § 10 Operation of MV Without a License

No Operation Where Under Sixteen
No person *under sixteen years of age shall operate a motor vehicle* upon any way.

Additional Violations
No other person shall so operate:

a) unless licensed by the registrar unless he possesses a receipt issued under section eight for persons licensed in another state or country or
b) unless he possesses a valid learner's permit issued under section eight B, except as is otherwise herein provided or
c) unless he is the spouse of a member of the armed forces of the United States who is accompanying such member on military or naval assignment to this commonwealth and who has a valid operator's license issued by another state, or
d) unless he is on active duty in the armed forces of the United States and has in his possession a license to operate motor vehicles issued by the state where he is domiciled, or
e) unless he is a member of the armed forces of the United States returning from active duty outside the United States, and has in his possession a license to operate motor vehicles issued by said armed forces in a foreign country, but in such case for a period of not more than ***forty-five days after his return.***

Nonresident Operation
The motor vehicle of a nonresident may be operated on the ways of the commonwealth in accordance with section three by its owner or by any nonresident operator without a license from the registrar if the nonresident operator is duly licensed under the laws of the state or country where such vehicle is registered ***and has such license on his person or in the vehicle in some easily accessible place.***

Nonresident Operation—Motor Vehicle Type
Subject to the provisions of section three, a nonresident who holds a license under the laws of the state or country in which he resides may operate any motor vehicle of a type which he is licensed to operate under said license, duly registered in this commonwealth or in any state or country; provided:

a) that he has the license on his person or in the vehicle in some easily accessible place, and
b) that, as finally determined by the registrar, his state or country grants substantially similar privileges to residents of this commonwealth and prescribes and enforces standards of fitness for operations of motor vehicles substantially as high as those prescribed and enforced by this commonwealth.

No Operation Under Suspension
Notwithstanding the foregoing provisions, no person shall operate on the ways of the commonwealth any motor vehicle, whether registered in this commonwealth or elsewhere, if the registrar shall have suspended or revoked any license to operate motor vehicles issued to him under this chapter, or shall have suspended his right to operate such vehicles, and such license or right has not been restored or a new license to operate motor vehicles has not been issued to him.

Suspension Penalty
Operation of a motor vehicle in violation of this paragraph shall be subject to the same penalties as provided in section twenty-three for operation after suspension or revocation and before restoration or issuance of a new license or the restoration of the right to operate.

C. 90 § 11 Certificate of Registration and License to Be Carried by Operator

Registration and License Upon Person

Every person operating a motor vehicle shall have the certificate of registration for the vehicle and for the trailer, if any, and his license to operate, upon his person or in the vehicle, in some easily accessible place.

Exceptions

The certificates of registration of dealers, manufacturers, repairmen, owner-repairmen, farmers or dealers in both boats and boat trailers need not be so carried.

Exceptions—Newly Acquired Vehicle

Additionally, the certificate of registration of a person who is operating a motor vehicle in accordance with the provisions of the last sentence of the fifth paragraph of section two need not be so carried.

Exceptions—Rental [phostat copy]

Additionally, in the case of a rental vehicle, a photostat copy of the certificate of registration, accompanied by the rental agreement, shall be sufficient to comply with the provisions of this section.

RMV Receipt Carried in Lieu of License of Registration for Not More than Sixty Days

If for any reason the registrar or his agents are unable to issue promptly to an applicant the certificate of registration or the license applied for, they may issue a receipt for the fee paid, and said receipt shall be carried in lieu of the certificate or license as the case may be, and for a period of sixty days from the date of its issue said receipt shall have the same force and effect given to the certificate or license by this chapter.

Written Demand Carried in Lieu of Registration or License When Returned to RMV for Inspection [sixty days]

If, in compliance with a written demand of the registrar or any of his authorized agents, a certificate of registration or license to operate is returned for inspection or for any other purpose, except for suspension or revocation, such written demand shall be carried in lieu of the certificate or license, as the case may be, and for the period of sixty days from its date said demand shall have the same force and effect given to the certificate or license by this chapter.

Exhibing License and Registration Upon Request at Accident

Any operator who knowingly collides with or causes injury to any person or damage to any property shall, upon the request of the person injured or the person owning or in charge of the property damaged, plainly exhibit to such person his license and, if required under the provisions of this chapter to carry the certificate of registration for the vehicle upon his person or in the vehicle, such certificate.

C. 90 § 12 Employing or Allowing Unlicensed Operator to Operate Vehicle

No person shall employ for hire as an operator any person not licensed in accordance with this chapter. No person shall allow a motor vehicle owned by him or under his control to be operated by any person who has no legal right so to do, or in violation of this chapter.

C. 90 § 13 Impeded Operation

No person, when operating a motor vehicle, shall permit to be on or in the vehicle or on or about his person anything which may interfere with or impede the proper operation of the vehicle or any equipment by which the vehicle is operated or controlled, except that a person may operate a motor vehicle while using a citizens band radio or mobile telephone as long as one hand remains on the steering wheel at all times.

No person having control or charge of a motor vehicle, except a person having control or charge of a police, fire or other emergency vehicle in the course of responding to an emergency, or a person having control or charge of a motor vehicle while engaged in the delivery or acceptance of goods, wares or merchandise for which the vehicle's engine power is necessary for the loading or unloading of such goods, wares or merchandise shall allow such vehicle to stand in any way and remain unattended without stopping the engine of said vehicle, effectively setting the brakes thereof or making it fast, and locking and removing the key from the locking device and from the vehicle.

Whenever a bus having a seating capacity of more than seven passengers, a truck weighing, unloaded, more than four

thousand pounds, or a tractor, trailer, semi-trailer or combination thereof, shall be parked on a way, on a grade sufficient to cause such vehicle to move of its own momentum, and is left unattended by the operator, one pair of adequate wheel safety chock blocks shall be securely placed against the rear wheels of such vehicle so as to prevent movement thereof. The provisions of the preceding sentence shall not apply to a vehicle equipped with positive spring-loaded air parking brakes.

No person shall drive any motor vehicle equipped with any television viewer, screen or other means of visually receiving a television broadcast which is located in the motor vehicle at any point forward of the back of the driver's seat or which is visible to the driver while operating such motor vehicle.

Whoever operates a motorcycle on the ways of the commonwealth shall ride only upon the permanent and regular seat attached thereto, and he shall not carry any other person, nor allow any other person to ride, on such motorcycle unless it is designed to carry more than one person, in which case a passenger may ride upon the permanent and regular seat if such seat is designed for two persons, or upon another seat which is intended for a passenger and is firmly attached to the motorcycle to the rear of the operator if proper foot rests are provided for the passenger's use, or upon a seat which is intended for a passenger and is firmly attached to the motorcycle in a side car.

No person shall operate a motor vehicle, commonly known as a pick-up truck, nor shall the owner permit it to be operated, for a distance more than five-miles, in excess of five miles per hour, with persons under twelve years of age in the body of such truck, unless such truck is part of an official parade, or has affixed to it a legal "Owner Repair" or "Farm" license plate or a pick-up truck engaged in farming activities.

No person, except firefighters or garbage collectors, or operators of fire trucks or garbage trucks, or employees of public utility companies, acting pursuant to and during the course of their duties, or such other persons exempted by regulation from the application of this section or by limited application by special permit granted by the selectmen in a town or of the city council in a city, shall hang onto the outside of, or the rear-end of any vehicle, and no person on a pedacycle, motorcycle, roller skates, sled, or any similar device, shall hold fast or attach the device to any moving vehicle, and no operator of a motor vehicle shall knowingly permit any person to hang onto or ride on the outside or rear-end of the vehicle or streetcar, or allow any person on a pedacycle, motorcycle, roller skates, sled, or any similar device, to hold fast or attach the device to the motor vehicle operated on any highway.

No person or persons, except firefighters acting pursuant to their official duties, shall occupy a trailer or semitrailer while such trailer or semitrailer is being towed, pushed or drawn or is otherwise in motion upon any way. No person shall operate a motor vehicle while wearing headphones, unless said headphones are used for communication in connection with controlling the course or movement of said vehicle.

C. 90 § 13A Persons in Motor Vehicles Required to Wear Safety Belts

No person shall operate a private passenger motor vehicle or ride in a private passenger motor vehicle, a vanpool vehicle or truck under eighteen thousand pounds on any way unless such person is wearing a safety belt which is properly adjusted and fastened; provided, however, *that this provision shall not apply to:*

(a) any child less than twelve years of age who is subject to the provisions of section seven AA;
(b) any person riding in a motor vehicle manufactured before July first, nineteen hundred and sixty-six;
(c) any person who is physically unable to use safety belts; provided, however, that such condition is duly certified by a physician who shall state the nature of the handicap, as well as the reasons such restraint is inappropriate; provided, further, that no such physician shall be subject to liability in any civil action for the issuance or for the failure to issue such certificate;
(d) any rural carrier of the United States Postal Service operating a motor vehicle while in the performance of his duties; provided, however, that such rural mail carrier shall be subject to department regulations regarding the use of safety belts or occupant crash protection devices;
(e) anyone involved in the operation of taxis, liveries, tractors, trucks with gross weight of eighteen thousand pounds or over, buses, and passengers of authorized emergency vehicles.

Any person who operates a motor vehicle without a safety belt, and any person sixteen years of age or over who rides as a passenger in a motor vehicle without wearing a safety belt in violation of this section, shall be subject to a fine of twenty-five dollars. Any operator of a motor vehicle shall be subject to an additional fine of twenty-five dollars for each

person under the age of sixteen and no younger than twelve who is a passenger in said motor vehicle and not wearing a safety belt. The provisions of this section shall be enforced by law enforcement agencies only when an operator of a motor vehicle has been stopped for a violation of the motor vehicle laws or some other offense.

Any person who receives a citation for violating this section may contest such citation pursuant to section three of chapter ninety C. A violation of this section shall not be considered as a conviction of a moving violation of the motor vehicle laws for the purpose of determining surcharges on motor vehicle premiums pursuant to section one hundred and thirteen B of chapter one hundred and seventy-five.

C. 90 § 14B Uniform Signals on All Ways; Penalty.

Every person operating a motor vehicle, before stopping said vehicle or making any turning movement which would affect the operation of any other vehicle, shall give a plainly visible signal by activating the brake lights or directional lights or signal as provided on said vehicle; and in the event electrical or mechanical signals are not operating or not provided on the vehicle, a plainly visible signal by means of the hand and arm shall be made. *Hand and arm signals shall be made as follows:*

1) An intention to turn to the left shall be indicated by hand and arm extended horizontally.
2) An intention to turn to the right shall be indicated by hand and arm extended upward.
3) An intention to stop or decrease speed shall be indicated by hand and arm extended downward.

Penalty [fine]
Whoever violates any provision of this section shall be punished by a fine of not less than twenty-five dollars for each offense.

C. 90 § 16. Offensive or Illegal Operation of Motor Vehicle Prohibited

No person shall operate a motor vehicle, nor shall any owner of such vehicle permit it to be operated, in or over any way, public or private, whether laid out under authority of law or otherwise, which motor vehicles are prohibited from using, provided notice of such prohibition is conspicuously posted at the entrance to such way.

No person shall operate a motor vehicle, nor shall any owner of such vehicle permit it to be operated upon any way, except fire department and fire patrol apparatus, unless such motor vehicle is equipped with a muffler to prevent excessive or unnecessary noise, which muffler is in good working order and in constant operation, and complies with such minimum standards for construction and performance as the registrar may prescribe.

No person shall use a muffler cut-out or by-pass.

No person shall operate a motor vehicle on any way which motor vehicle is equipped **(1)** with a muffler from which the baffle plates, screens or other original internal parts have been removed and not replaced; or **(2)** with an exhaust system which has been modified in a manner which will amplify or increase the noise emitted by the exhaust.

No person operating a motor vehicle shall sound a bell, horn or other device, nor in any manner operate such motor vehicle so as to make a harsh, objectionable or unreasonable noise, nor permit to escape from such vehicle smoke or pollutants in such amounts or at such levels as may violate motor vehicle air pollution control regulations adopted under the provisions of chapter one hundred and eleven.

No siren shall be mounted upon any motor vehicle except fire apparatus, ambulances, vehicles used in official line of duty by any member of the police or fire fighting forces of the commonwealth or any agency or political subdivision thereof, and vehicles owned by call fire fighters or by persons with police powers and operated in official line of duty, unless authorized by the registrar.

No person shall use on or in connection with any motor vehicle a spot light, so called, the rays from which shine more than two feet above the road at a distance of thirty feet from the vehicle, except that such a spot light may be used for the purpose of reading signs, and as an auxiliary light in cases of necessity when the other lights required by law fail to operate.

No person, except a duly authorized person driving an emergency fire vehicle, shall operate a motor vehicle equipped with metal studded tires upon a public way between May the first and November the first; provided, however, the registrar may authorize the use of such tires before November the first, if weather conditions require the use thereof. Whoever violates the provisions of this paragraph shall be punished by a fine of not more than fifty dollars.

C. 90 § 16A Unnecessary Operation of Engine of Stopped Motor Vehicle

No person shall cause, suffer, allow or permit the unnecessary operation of the engine of a motor vehicle while said vehicle is stopped for a foreseeable period of time in excess of five minutes.

This section shall not apply to:
(a) vehicles being serviced, provided that operation of the engine is essential to the proper repair thereof, or
(b) vehicles engaged in the delivery or acceptance of goods, wares, or merchandise for which engine assisted power is necessary and substitute alternate means cannot be made available, or
(c) vehicles engaged in an operation for which the engine power is necessary for an associate power need other than movement and substitute alternate power means cannot be made available provided that such operation does not cause or contribute to a condition of air pollution

Penalty [fine]
Whoever violates any provision of this section shall be punished by a fine of not more than one hundred dollars for the first offense, nor more than five hundred dollars for each succeeding offense.

C. 90 § 17 Speeding

No person operating a motor vehicle on any way shall run it at a rate of speed greater than is reasonable and proper, having regard to traffic and the use of the way and the safety of the public. Unless a way is otherwise posted in accordance with the provisions of section eighteen, it shall be prima facie evidence of a rate of speed greater than is reasonable and proper as aforesaid:

(1) if a motor vehicle is operated on a divided highway outside a thickly settled or business district at a rate of speed exceeding fifty miles per hour for a distance of a quarter of a mile, or
(2) on any other way outside a thickly settled or business district at a rate of speed exceeding forty miles per hour for a distance of a quarter of a mile, or
(3) inside a thickly settled or business district at a rate of speed exceeding thirty miles per hour for a distance of one-eighth of a mile, or
(4) within a school zone which may be established by a city or town as provided in section two of chapter eighty-five at a rate of speed exceeding twenty miles per hour.

Operation of a motor vehicle at a speed in excess of fifteen miles per hour within one-tenth of a mile of a vehicle used in hawking or peddling merchandise and which displays flashing amber lights shall likewise be prima facie evidence of a rate of speed greater than is reasonable and proper.

If a speed limit has been duly established upon any way, in accordance with the provisions of said section, operation of a motor vehicle at a rate of speed in excess of such limit shall be prima facie evidence that such speed is greater than is reasonable and proper; but, notwithstanding such establishment of a speed limit, every person operating a motor vehicle shall decrease the speed of the same when a special hazard exists with respect to pedestrians or other traffic, or by reason of weather or highway conditions. Except on a limited access highway, no person shall operate a school bus at a rate of speed exceeding forty miles per hour, while actually engaged in carrying school children.

C. 90 § 17B Drag Racing

No person shall operate a motor vehicle, nor shall any owner of such vehicle permit it to be operated, in a manner where the owner or operator accelerates at a high rate of speed in competition with another operator, whether or not there is an agreement to race, causing increased noise from skidding tires and amplified noise from racing enginers.

Penalty M [also suspension of operator's license by the RMV]
Whoever violates the provisions of this section shall be punished by a fine of not less than one hundred nor more than

five hundred dollars and the registrar shall suspend such operator's license for a period of not less than thirty days. A subsequent violation shall be punished by a fine of not less than two hundred nor more than one thousand dollars and a suspension of such license for a period of not less than sixty days.

Power of Arrest

There is no statutory right of arrest. However, it will be arrestable as a breach of the preace if committed within the officer's presence or view.

C. 90 § 21 Arrest Without Warrant for Certain Violations

Elements of the Statute:

1) any officer authorized to make **arrests**
2) may **arrest without a warrant** and keep in custody for not more than twenty-four hours
3) unless a Saturday, Sunday or a legal holiday intervenes
4) any person who
5) while operating a motor vehicle on any way, as defined in section one
6) violates the provisions of the first paragraph of section ten of chapter ninety [operating without a license; **in-presence arrest**]

Editor's Note: Any **arrest** made pursuant to this paragraph shall be deemed an **arrest** for the criminal offense or offenses involved and not for any civil motor vehicle infraction arising out of the same incident.

Additional Elements of the Statute:

1) any officer authorized to make **arrests**
2) provided such officer is in uniform or conspicuously displaying his badge of office
3) may **arrest without a warrant** and keep in custody for not more than twenty-four hours
4) unless Saturday, Sunday or legal holiday intervenes
5) any person
6) regardless of whether or not such person has in his possession a license to operate motor vehicles issued by the registrar
7) if such person upon any way or in any place to which the public has the right of access, or upon any way or in any place to which members of the public have access as invitees
8) operates a motor vehicle after his license or right to operate motor vehicles in this state has been suspended or revoked by the registrar **[in-presence only]**
9) or whoever upon any way or place to which the public has the right of access, or upon any way or in any place to which members of the public have access as invitees, ***or who the officer has probable cause to believe has operated*** or is operating a motor vehicle while under the influence of intoxicating liquor, marijuana or narcotic drugs, or depressant or stimulant substances, all as defined in section one of chapter ninety-four C, or under the influence of the vapors of glue, carbon tetrachloride, acetone, ethylene, dichloride, toluene, chloroform, xylene or any combination thereof **[in-presence and in-the-past arrest]**
10) or whoever uses a motor vehicle without authority knowing that such use is unauthorized **[in-presence only]**
11) or any person who, while operating or in charge of a motor vehicle, violates the provisions of section twenty-five of chapter ninety **[in-presence only]**
12) or whoever operates a motor vehicle upon any way or in any place to which members of the public have a right of access as invitees or licensees and without stopping and making known his name, residence and the register number of his motor vehicle goes away after knowingly colliding with or otherwise causing injury to any person **[in-presence only].**

Editor's Note: Any person who is **arrested** pursuant to this section shall, at or before the expiration of the time period prescribed, be brought before the appropriate district court and proceeded against according to the law in criminal or juvenile cases, as the case may be, provided, however, that any violation otherwise cognizable as a civil infraction shall retain its character as, and be treated as, a civil infraction notwithstanding that the violator is **arrested** pursuant to this section for a criminal offense in conjunction with said civil infraction.

An investigator or examiner appointed under section twenty-nine may **arrest without a warrant,** keep in custody for a like period, bring before a magistrate and proceed against in like manner, any person operating a motor vehicle while under the influence of intoxicating liquor or marijuana, narcotic drugs, depressants or stimulant substances, all as defined

in section one of chapter ninety-four C, irrespective of his possession of a license to operate motor vehicles issued by the registrar.

C. 90 § 23 Operating After Suspension or Revocation

Elements of the Statute:
1) whoever operates a motor vehicle
2) after having his or her license
3) revoked or suspended

Penalty M
This is a misdemeanor with a statutory right of arrest via c. 90 § 21 [in-presence only].

Editor's Note: This offense does not have to be committed on a public way. Once an operator's license is revoked or suspended, there can be no operation—anywhere. **Commonwealth v. Murphy,** 409 Mass. 665 (1991).

C. 90 § 24 Common Motor Vehicle Offenses; OUI

Elements of OUI
1) whoever operates a motor vehicle
2) upon any way or in any place to which the public has a right of access
3) or in any place to which members of the public have a right of access as invitees or licensees
4) under the influence of intoxicating liquor, marijuana, narcotic drugs or vapors of glue

Penalty M or F
This is a misdemeanor which carries a statutory right of arrest ***[in the past on probable cause]*** via c. 90 § 21. A defendant's 3rd OUI within 10 years will amounot to a 5 year felony.

Editor's Note: The usual disposition for first time violators is found in c. 90 § 24D, which calls for a 45-90 day loss of license. However, license loss will be 210 days if the defendant is under 21 years of age and attends the alcohol treatment rehabilitation program.

C. 90 § 24 Common Motor Vehicle Offenses—Endangering, Leaving the Scene, etc.

Elements of Reckless and Negligent Operation
1) whoever upon any way or in any place to which the public has a right of access, or any place to which members of the public have access as invitees or licensees
2) operates a motor vehicle recklessly
3) or operates such a vehicle negligently
4) so that the lives or safety of the public might be endangered

Penalty M
Misdemeanor with no power of arrest. However, depending on the circumstances of the event, it may rise to a breach of the peace triggering an arrest under the common law if viewed by a law enforcement officer with sworn powers of arrest.

Editor's Note: The crime of reckless operation is separate and distinct from that of operating so as to endanger. Although endangering requires mere negligence, the crime of operating recklessly requires intentional conduct involving a high degree of likelihood that substantial harm will result to another person or property. **Commonwealth v. DeSimone,** 349 Mass. 770 (1965).

Massachusetts Annotations:
In **Commonwealth v. Guillemette,** 243 Mass. 346 (1923), the Court held that convictions for reckless operation and endangering were not inconsistent with each other. Each requires different elements of proof.

It is necessary to prove intent consisting of an active state of mind amounting to reckless and wanton disregard of the lives of others for reckless operation. **Commonwealth v. Peach,** 239 Mass. 575 (1921).

Elements of Racing [editor's note: see new change on drag racing at c. 90 § 17B]
1) whoever upon any way or in any place to which the public has a right of access, or any place to which members of the public have access as invitees or licensees
2) operates a motor vehicle upon a bet or wager or in a race
3) or whoever operates a motor vehicle for the purpose of making a record and thereby violates any provision of section seventeen or any regulation under section eighteen

Penalty M
Misdemeanor with no power of arrest. However, depending on the circumstances of the event, it may rise to a breach of the peace triggering an arrest under the common law if viewed by a law enforcement officer with sworn powers of arrest.

Leaving the Scene After Property Damage
1) whoever without stopping and making known his name, residence and the register number of his motor vehicle
2) goes away after
3) knowingly colliding with or otherwise causing injury to any other vehicle or property

Penalty M
Misdemeanor with no power of arrest. However, depending on the circumstances of the event, it may rise to a breach of the peace triggering an arrest under the common law if viewed by a law enforcement officer with sworn powers of arrest.

Massachusetts Annotation:
In **Commonwealth v. Robbins**, 414 Mass. 444 (1993), the Court held that a person may be convicted of leaving the scene of an accident even though they are faultless in the accident itself.

Defendant Must Be Moving
In **Commonwealth v. Bleakney**, 278 Mass. 198 (1932), the Court stated that "[b]ut the words of the statute are not to be construed so as to make a defendant liable to the penalty imposes by the statute, merely because he was involved in a collision and went away without stopping and making known his name, residence and the number of his motor vehicle. It was not intended to punish the driver of a motor vehicle against which, while it is stopped in traffic, another person thoughtlessly or carelessly falls or walks where the position of such motor vehicle is a mere condition and not a cause of the collision. The words [of the statute] are 'knowing colliding.' As we interpret them, they mean that the defendant was in some way the actor, not a mere passive participant in a collision, but to some extent causing the collision or actively colliding."

Loaning License
1) whoever loans
2) or knowingly permits
3) his license
4) or learner's permit to operate motor vehicles
5) to be used by any person

Penalty M
Misdemeanor with no power of arrest.

False Statement in License Application
1) whoever makes false statements
2) in an application for a license or learner's permit
or
1) whoever knowingly makes any false statement
2) in an application for registration of a motor vehicle

Penalty M
Misdemeanor with no power of arrest.

Unlawful Taking and Using of a Motor Vehicle

1) whoever uses a motor vehicle

2) without authority
3) knowing that such use is unauthorized

Penalty M or F
Violators shall, for the first offense be punished by a fine of not less than fifty dollars nor more than five hundred dollars or by imprisonment for not less than thirty days nor more than two years, or both, and for a second offense by imprisonment in the state prison for not more than five years.

Massachusetts Annotation:
In **Commonwealth v. Giannino**, 371 Mass. 700 (1977), the term "use" may include a passenger within the vehicle. However, the government must prove that the use of knowingly unauthorized.

Power of Arrest
There is a statutory right of arrest under c. 90 § 21.

Leaving the Scene After Causing Personal Injury
1) Whoever operates a motor vehicle upon any way or in any place to which the public has right of access, or upon any way or in any place to which members of the public shall have access as invitees or licensees
2) and without stopping and making known his name, residence and the registration number of his motor vehicle
3) goes away after
4) knowingly colliding with or otherwise causing injury to any person not resulting in the death of any person

Penalty M
Violators shall be punished by imprisonment for not less than six months nor more than two years and by a fine of not less than five hundred dollars nor more than one thousand dollars. There is a statutory right of arrest under c. 90 § 21 [in-presence only].

Leaving the Scene Death Resulting [without stopping and making known name, etc.]
1) whoever operates a motor vehicle upon any way or in any place to which the public has a right of access or upon any way or in any place to which members of the public shall have access as invitees or licensees
2) and without stopping and making known his name, residence and the registration number of his motor vehicle
3) goes away
4) to avoid prosecution
5) or evade apprehension
6) after knowingly colliding with or otherwise causing injury to any person causing death

Penalty F
Violators shall be punished by imprisonment in the state prison for not less than two and one-half years nor more than ten years and by a fine of not less than one thousand dollars nor more than five thousand dollars or by imprisonment in a jail or house of correction for not less than one year nor more than two and one-half years and by a fine of not less than one thousand dollars nor more than five thousand dollars.

C. 90 § 24B Stealing, Altering, Forging, Counterfeiting License, Registration, etc.

Elements of the Statute
1) whoever falsely makes, steal, alters, forges or counterfeits or procures
2) or assists another to falsely make, steal, alter, forge or counterfeit
3) a learner's permit
4) a license to operate motor vehicles
5) an identification card issued under section eight E
6) a certificate of registration of a motor vehicle or trailer
7) or an inspection sticker

or

1) whoever forges or without authority uses
2) the signature, facsimile of the signature, or validating signature stamp of the registrar or deputy registrar
3) upon a genuine, stolen or falsely made, altered, forged or counterfeited
4) learner's permit

5) license to operate motor vehicles
6) certificate of registration of a motor vehicle or trailer
7) or inspection sticker
or
1) whoever has in his possession, or utters, publishes as true or in any way makes use of a
2) falsely made, stolen, altered, forged or counterfeited
3) learner's permit
4) license to operate motor vehicles
5) an identification card issued under section eight E
6) certificate of registration of a motor vehicle or trailer
7) or inspection sticker
or
1) whoever has in his possession, or utters, publishes as true, or in any way makes use of
2) a falsely made, or validating signature stamp of the registrar or deputy registrar

Penalty F
Violators shall be punished by a fine of not more than five hundred dollars or by imprisonment in the state prison for not more than five years or in jail or house of correction for not more than two years.

Additional Elements of the Statute:
1) whoever
2) falsely impersonates
3) the person named in an application for a license or learner's permit to operate motor vehicles
or
1) whoever
2) procures or assists another to
3) falsely impersonate the person named in such an application
4) whether of himself or another
5) or uses a name other than his own to falsely obtain such a license
or
1) whoever has in his possession, or utters, publishes as true, or in any way makes use of a
2) license or learner's permit to operate motor vehicles that was obtained in such a manner

Penalty F
Violators shall be punished by a fine of not more than five hundred dollars or by imprisonment in the state prison for not more than five years or in a jail or house of correction for not more than two years.

C. 90 § 24G Motor Vehicle Homicide While Under the Influence of an Intoxicating Substance [felony]

1) whoever upon any way or in a place to which the public has a right to access, or
2) upon any way or in any place to which members of the public have access as invitees or licenses
3) while under the influence of intoxicating liquor, or of marijuana, narcotic drugs, depressants, or stimulant substances, all as defined in G.L. c. 94C, § 1, or the vapors of glue
4) operates
5) motor vehicle
6) recklessly or negligently
7) lives and safety of the public might be endangered
8) by such operation causes the death of another person

Penalty F
This is a fifteen (15) felony.

C. 90 § 24G Motor Vehicle Homicide [misdemeanors]

Elements of the Statute

1) whoever upon any way or in any place to which the public has a right of access, or

2) upon any way or in any place to which members of the public have access as invitees or licenses
3) operates
4) motor vehicle
5) while under the influence of intoxicating liquor, or of marijuana, narcotic drugs, depressants, or stimulant substances, all as defined in G.L. c. 94C, § 1, or the vapors of glue
6) by such operation causes the death of another person
or
1) whoever upon any way or in any place to which the public has a right of access, or
2) upon any way or in any place to which members of the public have access as invitees or licenses
3) operates
4) motor vehicle
5) recklessly or negligently
6) lives or safety or the public might be endangered and
7) by such operation causes the death of another person

Penalty M
This is a 2 1/2 year misdemeanor ***with no statutory right of arrest.***

Editor's Note: Just because the operator is intoxicated and causes the death of another person does not automatically make it a felony. What is required is the additional element of negligent or reckless operation in addition to the OUI.

C. 90 § 24L Serious Bodily Injury by MV While Under the Influence of an Intoxicating Substance [felony]

1) whoever upon any way or in a place to which the public has a right to access, or
2) upon any way or in any place to which members of the public have access as invitees or licenses
3) while under the influence of intoxicating liquor, or of marijuana, narcotic drugs, depressants, or stimulant substances, all as defined in G.L. c. 94C, § 1, or the vapors of glue
4) operates
5) motor vehicle
6) recklessly or negligently
7) lives and safety of the public might be endangered
8) by such operation causes serious bodily injury

Penalty F
This is a ten (10) felony.

C. 90 § 24L Serious Bodily Injury by Motor Vehicle [misdemeanor]

Elements of the Statute

1) whoever upon any way or in any place to which the public has a right of access, or
2) upon any way or in any place to which members of the public have access as invitees or licenses
3) operates
4) motor vehicle
5) while under the influence of intoxicating liquor, or of marijuana, narcotic drugs, depressants, or stimulant substances, all as defined in G.L. c. 94C, § 1, or the vapors of glue
6) by such operation causes serious bodily injury

Penalty M
This is a 2 1/2 year misdemeanor ***with no statutory right of arrest.***

Editor's Note: Serious bodily injury is defined by c. 90 § 24L(3) as "bodily injury which creates a substantial risk of death or which involves either total disability or the loss or substantial impairment of some bodily function for a substantial period of time."

C. 90 § 25 Refusal to Obey Police Officer

Elements of the Statute:
1) any person who
2) while operating or in charge of a motor vehicle
3) shall refuse
4) when requested by a police officer
5) to give his name and address ***or*** the name and address of the owner of such motor vehicle
6) or who shall give a false name or address
7) or who shall refuse or neglect to stop when signalled to stop by any police officer who is in uniform or who displays his badge conspicuously on the outside of his outer coat or garment
or
1) who refuses, on demand of such officer
2) to produce his license to operate such vehicle or his certificate of registration
3) or to permit such officer to take the license or certificate in hand for the purpose of examination
or
1) who refuses, on demand of such officer
2) to sign his name in the presence of such officer
3) and any person who on the demand of an officer of the police or other officer mentioned in section twenty-nine or authorized by the registrar
4) without a reasonable excuse fails to deliver his license to operate motor vehicles or the certificate of registration of any motor vehicle operated or owned by him or the number plates furnished by the registrar for said motor vehicle
5) or who refuses or neglects to produce his license when requested by a court or trial justice

Penalty M
Violators shall be punished by a fine of one hundred dollars. **Editor's Note:** The above provisions in c. 90 § 25 are all arrestable via c. 90 § 21.

C. 90 § 34J Penalty for Operating Motor Vehicle Without Insurance

Elements of the Statute
1) whoever operates or permits to be operated
2) or permits to remain on a public or private way
3) a motor vehicle which is subject to the provisions of section one A
4) during such time as the motor vehicle liability policy or bond or deposit required by the provisions of this chapter has not been provided and maintained in accordance therewith

Penalty M—Violators shall be punished by a fine of not less than five hundred nor more than five thousand dollars or by imprisonment for not more than one year in a house of correction, or both such fine and imprisonment; provided, however, that any municipality that enforces the provisions of this section shall retain such fine. This section shall not apply to a person who operates a motor vehicle leased under any system referred to in section thirty-two C without knowledge that the lessor thereof has not complied with the provisions of section thirty-two E relative to providing indemnity, protection or security for property damage.

Certified Copy of the RMV
In proceedings under this section, written certification by the registrar of motor vehicles that the registry of motor vehicles has no record of a motor vehicle liability policy or bond or deposit in effect at the time of the alleged offense as required by the provisions of this chapter for the motor vehicle alleged to have been operated in violation of this section, shall be admissible as evidence in any court of the commonwealth and shall raise a rebuttable presumption that no such motor vehicle liability policy or bond or deposit was in effect for said vehicle at the time of the alleged offense. Such presumption may be rebutted and overcome by evidence that a motor vehicle liability policy or bond or deposit was in effect for such vehicle at the time of the alleged offense.

Penalty [fine]—Any person who is convicted of, or who enters a plea of guilty to a violation of this section shall be liable to the plan organized pursuant to section one hundred and thirteen H of chapter one hundred and seventy-five in the amount of the greater of five hundred dollars or one year's premium for compulsory motor vehicle insurance for the highest rated territory and class or risk in effect at the time of the commission of the offense. Said liability shall be in

addition to all other liabilities imposed on the person so convicted or so pleading whether civil or criminal. The said plan shall apply any sums collected hereunder, to defray its costs of collection and to defray in whole or in part its expenses for preventing fraud and arson.

License Suspension

Furthermore, any person who is convicted of, or enters a plea of guilty to a violation of this section shall have his or her license or right to operate a motor vehicle suspended for sixty days by the registrar of motor vehicles upon the registrar's receipt of notification from the clerk of any court which enters any conviction hereunder or which accepts such plea of guilty. The clerk of any court which enters any conviction hereunder or which accepts such plea shall promptly notify the registrar of motor vehicles and the Commonwealth Auto Reinsurers pursuant to section one hundred and thirteen of chapter one hundred and seventy-five or any successor thereto of such entry of acceptance of such plea.

Licenser Suspension; Second or Subsequent Offense

For any second or subsequent said conviction or plea of guilty within a six year period the offender's license or right to operate a motor vehicle shall be suspended for one year by the registrar upon the registrar's receipt of such notification by the clerk of any such court.

C. 90D § 32 Motor Vehicle Title Violations; Penalties

Elements of the Statute:
1) whoever falsely makes, alters, forges, or counterfeits
2) a certificate of title or salvage title
3) or alters or forges an assignment of a certificate of title or salvage title
4) or supporting documents
5) or an assignment
6) or release of a security interest
7) on a certificate of title or a form the registrar prescribes
or
1) whoever
2) has possession of or uses a
3) certificate of title or salvage title
4) knowing it to have been altered, forged, or counterfeited
or
1) whoever
2) uses a false or fictitious name or address
3) or makes a material false statement or fails to disclose a security interest
4) or conceals any other material fact
5) in an application for a certificate of title or salvage title
6) or supporting documents

Penalty F—Violators shall be punished by a fine of not more than one thousand dollars or by imprisonment in the state prison for not more than five years, or in a jail or house of correction for not more than two years, or both.

Additional Elements
1) whoever permits another not entitled thereto
2) to use or have possession of a certificate of title or salvage title
3) or fails to mail or deliver a certificate of title, salvage title or application therefor
4) to the registrar within ten days after the time required by this chapter
or
1) whoever fails to deliver to the transferee
2) or the registrar
3) a certificate of title or salvage title within ten days after the time required by this chapter
or
1) whoever violates any other provision of the chapter, except as provided for in paragraph (a)

Penalty M—Violators shall be punished by a fine of not less than five hundred dollars nor more than one thousand dollars or by imprisonment in a jail or house of correction for not more than six months, or both.

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Police Interrogation/Identification Contextual Analysis

Disseminated
in Conjunction with the
Massachusetts Criminal Justice Training Council
for 1996 state-wide in-service training

Custody and/or Arrest

Arraignment Post-Indictment Formally Charged

Custody | **Continued Police Custody** | **No Custody**

5th Amendment Context [*Miranda* Requirement]

Miranda Warnings

1) Right to Remain Silent
2) Statements Can be Used
3) Right to Counsel
4) Appointment of Counsel

Police must be able to differentiate between these two rights, *if they are invoked by the suspect*

Invocation of Right to Remain Silent

i. reinterrogation permissible on any subject matter if:
a) honor right to cut off questioning;
b) there is a significant break; and
c) fresh set of warnings with waiver

Invocation of Right to Counsel

i. reinterrogation not permissible at all while subject is in police custody, *unless the defendant initiates*

2 Prongs of Miranda

1) Custody, and
2) Questioning

Editor's Note: The interrogation, to require Miranda, must concern testimonial or communicative evidence and NOT physical evidence. If the questioning concerns physical evidence, then Miranda will not be required. Example: Breath testing, photos, line-ups, bring-backs, field IDs, writing exemplars, voice exemplars, and blood testing.

6th Amd Context

Interrogations—
Auto Attachment
Offense-specific, therefore, police can question on any other crime, notwithstanding any earlier invocations made by the defendant. No Custody Required; Automatically insulated from any police interference.

Identifications—
Auto Attachment to all corporeal IDs.
Offense-specific, just as above.
No Custody Required; Automatically insulated from any police interference.

*Non-corporeal IDs do not receive 6th Amd. protection, e.g. photo IDs.

14th Amd. [Due Process; Voluntariness]: Inculpatory statements that are a product of coercion and duress will be suppressed as a violation of "due process"; the "human practice rule"

Disseminated
in Conjunction with the
Massachusetts Criminal Justice
Training Council
July/August 1996

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Search and Seizure Chart—1996/97

Is there a reasonable expectation of privacy in the area controlled by the defendant?
If so—what standard of evidence is required to lawfully intrude for investigative purposes?

4 Types of Police Intrusions & 4th AMD Requirements

non-seizure	seizure	seizure	seizure
Encounter	**Stop**	**Frisk**	**Evidentiary**
A police officer does not need any reasonable suspicion at all to approach a person and engage them in a conversation; the person will be free to walk away if they desire; they speak to police and expose themselves at their own peril.	Reason suspicion based on specific and articulable facts that suspect has, is, or is about to commit a crime. This will empower police to effect a stop, or investigative detention, or threshold inquiry, *but not necessarily a frisk*	Reasonable suspicion based on specific and articulable facts to believe that the suspect is unlawfully armed <u>OR</u> where the officer is in immediate proximity of a person reasonably believed to be armed and dangerous; *the scope is strictly limited to weapons or objects that can be used as such*	Probable Cause *Then Require Either:* 1) Warrant 2) Consent 3) Exigent Circumstances Emergency circumstances do not require probable cause.

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CPR & FIRST RESPONDER

CPR FACT SHEET

	ONE RESCUER	TWO RESCUER	RATE/MIN.	DEPTH
ADULT (>8)	15:2	5:1	80-100	1.5-2"
CHILD (1-8)	5:1	5:1	100	1-1.5"
INFANT (<1)	5:1	NONE	At Least 100	.5-1"

RESCUE BREATHING ONLY:

ADULT: 12 Breaths Per Minute

CHILD: 20 Breaths Per Minute

INFANT: 20 Breaths Per Minute

CHOKING

CONSCIOUS

ADULT: Abdominal Thrusts 5 / Evaluate / Repeat if necessary

CHILD: Abdominal Thrusts 5 / Evaluate / Repeat if necessary

INFANT: Back Blows 5 / Chest Thrusts 5 / Evaluate / Repeat if necessary

UNCONSCIOUS *(NOTIFY EMS AS SOON AS UNCONSCIOUS)*

ADULT: Abdominal Thrusts 5 / Finger Sweep / Ventilation Attempts * / Repeat
(USE CHEST THRUSTS ON OBESE PEOPLE / NO PREGNANT WOMEN)

CHILD: Abdominal Thrusts 5 / Look & Sweep (only if visible) / Ventilation Attempts * / Repeat

INFANT: Back Blows 5 / Chest Thrusts 5 / Look & Sweep (only if visible) / Ventilation Attempts * / Repeat

** IF FIRST VENTILATION DOES NOT ENTER LUNGS, REPOSITION HEAD AND ATTEMPT VENTILATION AGAIN.*

CPR Protocol

1. SCAN AREA
   - Is it safe for me?
   - What precautions must I take right now?
     - Mask / Shield Device
     - Gloves

2. DETERMINE UNRESPONSIVENESS
   - Adults:
     - Gently Shake
     - Sternal Rub
   - Children / Infants:
     - Loud Shout
     - Stimulate Extremities

3. ADULT PATIENTS ONLY: Notify EMS if not done so already.
   (with children and infants go on with procedure)

4. OPEN THE AIRWAY! Is the patient breathing? (LOOK - LISTEN - FEEL)
   - Head Tilt / Chin Lift
   - Modified Jaw Thrust Maneuver for trauma / neck injuries

5. DELIVER TWO VENTILATIONS
   - Slow & Easy Breaths sufficient to raise the chest
     (1.5 to 2 seconds each)

6. CHECK FOR PRESENCE OF PULSE
   - Adults & Children: Carotid Artery (neck)
   - Infants: Brachial Artery (upper arm)

7. IF NO PULSE IS PRESENT: BEGIN COMPRESSIONS
   - Adults & Children:
     - Landmark: 2 fingers width above notch at bottom of Sternum.
   - Infants:
     - Landmark: one finger width below nipple line

   Adults: 2 Hands Child: One Hand Infants: 2 Fingers

8. RE-ASSESS AFTER ABOUT ONE MINUTE
   - In Children and Infant cases notify EMS at this point.

Foreign-Body Airway Obstruction

Performance Guidelines

	Adult	Child	Infant
Conscious	1 Ask "Are you choking?"	1 Ask "Are you choking?"	1 Confirm complete airway obstruction (look, listen, feel) Check for serious breathing difficulty, ineffective cough, no strong cry.
	2 Give abdominal thrusts (chest thrusts for pregnant or obese victim).	2 Give abdominal thrusts.	2 Give up to 5 back blows and 5 chest thrusts.
	3 Repeat thrusts until effective or victim becomes unconscious.	3 Repeat thrusts until effective or victim becomes unconscious.	3 Repeat back blows and chest thrusts until effective or victim becomes unconscious.
Becomes Unconscious	4 Activate EMS system.	4 If second rescuer is available, have him or her activate the EMS system.	4 If second rescuer is available, have him or her activate the EMS system
	5 Perform a tongue-jaw lift followed by a finger sweep to remove the object.	5 Perform a tongue-jaw lift, and if you see the object, perform a finger sweep to remove it.	5 Perform a tongue-jaw lift, and if you see the object, perform a finger sweep to remove it.
	6 Open airway and try to ventilate; if still obstructed, reposition head and try to ventilate again.	6 Open airway and try to ventilate; if still obstructed, reposition head and try to ventilate again.	6 Open airway and try to ventilate; if still obstructed, reposition head and try to ventilate again.
	7 Give up to 5 abdominal thrusts (up to 5 chest thrusts for pregnant or obese victim).	7 Give up to 5 abdominal thrusts.	7 Give up to 5 back blows and 5 chest thrusts.
	8 Repeat steps 5 through 7 until effective. *	8 Repeat steps 5 through 7 until effective. *	8 Repeat steps 5 through 7 until effective. *
		9 If airway obstruction is not relieved after about 1 minute, activate the EMS system.	9 If airway obstruction is not relieved after about 1 minute, activate the EMS system.
Found Unconscious	1 Establish unresponsiveness (gently shake and shout). Activate the EMS system.	1 Establish unresponsiveness (gently shake and shout). If second rescuer is available, have him or her activate the EMS system.	1 Establish unresponsiveness (gently shake and shout). If second rescuer is available, have him or her activate the EMS system
	2 Open airway (head tilt-chin lift or jaw thrust).	2 Open airway (head tilt-chin lift or jaw thrust).	2 Open airway (head tilt-chin lift or jaw thrust).
(3-5 sec)	3 Check breathing (look, listen, feel). *	3 Check breathing (look, listen, feel). *	3 Check breathing (look, listen, feel). *
	4 If breathing is absent, try to ventilate; if still obstructed, reposition head and try to ventilate again.	4 If breathing is absent, try to ventilate; if still obstructed, reposition head and try to ventilate again.	4 If breathing is absent, try to ventilate; if still obstructed, reposition head and try to ventilate again.
	5 Give up to 5 abdominal thrusts (up to 5 chest thrusts for pregnant or obese victim).	5 Give up to 5 abdominal thrusts.	5 Give up to 5 back blows and 5 chest thrusts.
	6 Perform a tongue-jaw lift followed by a finger sweep to remove the object.	6 Perform a tongue-jaw lift, and if you see the object, perform a finger sweep to remove it.	6 Perform a tongue-jaw lift, and if you see the object, perform a finger sweep to remove it.
	7 Repeat steps 4 through 6 until effective. *	7 Repeat steps 4 through 6 until effective. *	7 Repeat steps 4 through 6 until effective. *
		8 If airway obstruction is not relieved after about 1 minute, activate the EMS system.	8 If airway obstruction is not relieved after about 1 minute, activate the EMS system.

* If victim is breathing or resumes effective breathing, and if no trauma is suspected, place in recovery position.

One-Rescuer CPR

Performance Guidelines

	Adult	Child	Infant
Assessment	1 Establish unresponsiveness (gently shake and shout). Activate the EMS system.	1 Establish unresponsiveness (gently shake and shout). If second rescuer is available, have him or her activate the EMS system.	1 Establish unresponsiveness (gently shake and shout). If second rescuer is available, have him or her activate the EMS system.
Airway	2 Open airway (head tilt-chin lift or jaw thrust).	2 Open airway (head tilt-chin lift or jaw thrust)	2 Open airway (head tilt-chin lift or jaw thrust).
Breathing (3-5 sec)	3 Check breathing (look, listen, feel).* If breathing is absent, give 2 slow breaths (1-1/2 to 2 seconds inspiration), watch chest rise, allow for exhalation between breaths.	3 Check breathing (look, listen, feel).* If breathing is absent, give 2 slow breaths (1 to 1-1/2 seconds inspiration), watch chest rise, allow for exhalation between breaths.	3 Check breathing (look, listen, feel).* If breathing is absent, give 2 slow breaths (1 to 1-1/2 seconds inspiration), watch chest rise, allow for exhalation between breaths
Circulation (5-10 sec)	4 Check carotid pulse. If breathing is absent but pulse is present, provide rescue breathing (1 breath every 5-6 sec.; about 10-12 breaths per minute)	4 Check carotid pulse. If breathing is absent but pulse is present, provide rescue breathing (1 breath every 3 seconds; about 20 breaths per minute).	4 Check brachial pulse. If breathing is absent but pulse is present, provide rescue breathing (1 breath every 3 seconds; about 20 breaths per minute)
CPR	5 If no pulse, give cycles of 15 chest compressions followed by 2 slow breaths (rate: 80 to 100 compressions per minute) (depth: 1-1/2 to 2 inches)	5 If no pulse, give cycles of 5 chest compressions followed by 1 slow breath. (rate: 100 compressions per minute) (depth: 1 to 1-1/2 inches ... or ... 1/3 to 1/2 chest height)	5 If no pulse, give cycles of 5 chest compressions followed by 1 slow breath. (rate: at least 100 compressions per minute) (depth: 1/2 to 1 inch ... or ... 1/3 to 1/2 chest height)
Pulse Check (3-5 sec)	6 After 4 cycles of 15:2 (about 1 minute), check pulse and breathing.* If no pulse, continue 15:2 cycles beginning with chest compressions.	6 After 20 cycles of 5:1 (about 1 minute), check pulse and breathing.* If rescuer is alone, activate the EMS system. If no pulse, continue 5:1 cycles beginning with chest compressions.	6 After 20 cycles of 5:1 (about 1 minute), check pulse and breathing.* If rescuer is alone, activate the EMS system. If no pulse, continue 5:1 cycles beginning with chest compressions

*** If victim is breathing or resumes effective breathing, and if no trauma is suspected, place in recovery position.**

The Commonwealth of Massachusetts

Executive Office of Health and Human Services
Department of Public Health
Office of Emergency Medical Services
470 Atlantic Avenue, Second Floor
Boston, MA 02210-2208
(617) 753-8300

WILLIAM F. WELD
GOVERNOR

ARGEO PAUL CELLUCCI
LT GOVERNOR

GERALD WHITBURN
SECRETARY

DAVID H. MULLIGAN
COMMISSIONER

November 30, 1995

Jim Tzitzon
Via FAX

Dear Jim:

As you requested, here is some information on the "Do Not Resuscitate" or DNR issue and its impact on EMS. The first document is a copy of the "MDPH/OEMS CPR Guidelines", first distributed in 1987. The DNR issue is addressed under the "TERMINAL ILLNESS" section.

The state EMS regulations, 105 CMR 170.255, mandate that ambulance services and their employees must respond to a critical or unknown illness or injury, they must render treatment (underline added), and they must provide transportation to all patients, without any exceptions. The actual regulation is quoted at the end of the enclosed CPR guidelines.

Please note, that in Massachusetts valid, original "DNR" orders are not currently, legally binding on EMTs or First Responders in the prehospital setting, unless the EMT chooses to honor the written DNR order. EMTs are free either to "honor" a valid "DNR order", o to disregard the "order" and provide treatment and transportation, as required in the state EMS regulations.

DNR orders, written by physicians, are not yet legally binding on EMTs or First Responders, since there is no established legal relationship between most physicians and prehospital personnel, nor is there any statute establishing the legal status of DNR orders, especially in the prehospital care setting, to date.

Please note also that DNR orders are also capable of being "voided" at any time by the patient, physician, health care facility staff and/or family members (e.g. calling for help or an ambulance may "void" the DNR order). This might occur in the home, hospice and/or health care facility setting.

As indicated in the October 28, 1992, issue of JAMA, the latest CPR Guidelines indicate that an EMT may honor a valid DNR order. If the EMT or First Responder chooses to honor the DNR order, we strongly advise them to attach the original DNR order, or a valid copy, to the completed ambulance trip sheet or run record.

The EMTs must then leave the patient where they are, advise the family or other responsible parties to contact the physician/nurse/hospice and/or medical examiner for advice and to return to active service immediately.

If the EMT or First Responder is not presented with a valid DNR order or cannot immediately verify with the physician, that a valid DNR order exists, they must treat and transport the patient, in accordance with the state EMS regulations.

The current JAMA CPR Guidelines were meant to address the issue of the cardiac arrest in the home and/or hospice setting. Patients in a health care facility (nursing or rest home) present the EMS system with another set of issues. It is not unusual for physician's orders to be updated every 90 days in such settings. Again, the validity of the order may need to be verified, but if the written DNR order otherwise meets the guidelines listed in the AHA CPR Guidelines (JAMA), the EMT or First Responder may honor the order, irrespective of the date the order was issued.

If a patient, with a valid DNR order, expires in an ambulance, the EMTs are confronted with a very difficult decision. If they are to honor the DNR order, there must be a signed, written directive from the patient's physician or from the "sending" facility, that inform the EMTs where to transport the "dead body".

Many "receiving" facilities (hospitals) are rightfully refusing to accept a "dead body". There have also been a few instances where the "sending" facility (nursing home) has refused to accept the "dead body" back from the ambulance service.

Hospital staff have reminded the EMTs that hospitals are not in the business of pronouncing people dead and the EMTs had no business bringing a person with a DNR order to the hospital to have them "pronounced dead" there. This task should be performed b the physician who wrote the "DNR" order.

There have been cases where "dead bodies" have remained in the back of an ambulance for many hours, because the EMTs could not properly dispose of the "dead body". The "receiving" hospital and the "sending" nursing home both have refused to accept the "dead body".

In one instance, when the medical examiner was contacted and finally arrived on scene, the medical examiner forcefully reminded th EMTs that it is illegal to move (transport) a "dead body" in anything except a licensed hearse. The EMTs were also reminded that they should not be moving dead bodies from where they died, nor in this particular case, should they have crossed a county line while transporting the "dead body". In addition, no funeral home would accept the "dead body" without a signed death certificate, that the EMTs, of course, did not possess.

It is our understanding that neither hospitals nor ambulance services can receive reimbursement from an insurer for pronouncing a person dead or for moving a "dead body". Insurance reimbursement is apparently contingent upon providing appropriate medical car and/or medically necessary transportation.

Unless an established written mechanism exists to relieve the EMTs of a "dead body", it is our opinion that the EMTs and their employers must adhere to the requirements in the state EMS regulations, (105 CMR 170.255), and provide appropriate EMT level treatment and transportation, when actually transporting a patient who has a valid, written DNR order.

The issue of whether an ambulance can transport a dead body is very clear. Under 105 CMR 170.260, ambulances are generally prohibited from transporting a dead body, except "...where it is in the interest of public health and/or safety to do so." The cases we envisaged, when we adopted that regulation, were those involving bodies in a public setting (e.g. on a highway), that needed to be moved quickly in order to prevent another accident. In this scenario, it might be appropriate to move the "dead body" from the travel lane to the shoulder or median strip to await the medical examiner's arrival.

In addition, the state regulations governing funeral homes, (239 CMR 3.10) also prohibits any vehicle, other than a certified hearse, from moving a dead body.

Finally, if you do not already have a copy, you may wish to obtain a copy of the current AHA CPR & ECC Guidelines, as published i JAMA on October 28, 1992, from your local Heart Association office. This document helps to establish the national standards of car and deals with the issues in the DPH/OEMS CPR Guidelines in far greater detail.

The new "Comfort One" DNR program will hopefully establish a system where the patient's right to die decision will not initiate an EMS response, but if EMS is activated, we will have the ability to honor the patient's decision. If you have any other questions or concerns, please feel free to contact me directly, at the above address.

Yours truly,

OFFICE OF EMERGENCY MEDICAL SERVICES

Paul

Paul H. Coffey, EMT
Basic EMT Training Coordinator

enc:

MASSACHUSETTS
DEPARTMENT of PUBLIC HEALTH
UNPROTECTED EXPOSURE TRIP FORM

Today's Date	Incident Date	Receiving Hospital
Transporting Ambulance Service		Ambulance Trip Report #

Patient Information	**Rescuer Information**	
Name	Name	
Incident Location	Address	
Incident Type ☐ Medical ☐ Trauma	City/State/Zip	
Transportation ☐ Emergency ☐ Routine	Day Phone	Evening Phone
	Profession	Department

Check boxes which best indicate your exposure. Explain fully in the description space below.

Exposure Route: ☐Needlestick ☐Open Cut ☐ Bite ☐Puncture ☐ Mouth ☐Eye ☐ Other

Exposure Type: ☐Blood ☐Sputum ☐Saliva ☐ Other

Precautions: ☐ Mask ☐ Eye Wear ☐Gown ☐Gloves(vinyl/latex) ☐Gloves(Work) ☐Other

Cleaning: ☐ Hand washing ☐Washing contaminated skin ☐Other

Describe the nature of the exposure:

Describe medical treatment sought by rescuer following the unprotected exposure:

I understand that I will be informed of an unprotected exposure only if the patient was diagnosed as having an infectious disease as defined in 105 CMR 172.000, and if in the view of medical personnel my documented exposure was capable of transmitting that disease.

Rescuer's Signature _____ Date _____

Form received by _____ Date _____

DPH 3/89

--- CPR / FBAO Skills Checksheet ---

Name: Date:

Last, First M.I.

Written Exam: ____ %

Practical Exam: P F

CPR (One Rescuer):	Adult	Child	Infant
Establish unresponsiveness; Verbalize need to activate EMS!			
Open airway			
Assess breathing (Look, Listen, Feel ... 3-5 seconds)			
Ventilate twice (Adult: 1.5-2 sec/inspiration ... Child & Infant:1-1.5 sec/inspiration)			
Assess pulse (5-10 seconds); Maintain airway			
Landmark			
Chest compressions/ventilations:			
• 4-cycles 15:2 Landmark[ ] Depth[ ] Rate[ ] Ratio[ ] 1[ ] 2[ ] 3[ ] 4[ ]			
• [redacted]cycles 5:1 Landmark[ ] Depth[ ] Rate[ ] Ratio[ ]			
Pulse check, Maintain airway; Check breathing			
Verbalize need to activate EMS!			
Continue CPR with chest compressions			
Instructor's Initials:			

* Practical skills testing recommendation is 1-minute for adult (4-cycles) and 30-seconds for pediatric (10-cycles)

CPR (Two Rescuer):	Adult	Child
2nd Rescuer: Identifies self		
1st Rescuer: Completes cycle; Checks pulse/breathing		
2nd Rescuer: Positions at chest; Landmarks		
1st Rescuer: Says "No Pulse! Continue CPR!"		
2nd Rescuer: 5-compressions: "1&2&3&4&5"... stop		
1st Rescuer: 1-ventilation; Maintains airway		
1st Rescuer: Chest compressions/ventilations: 5:1-ratio		
2nd Rescuer: Says "Change &2&3&4&5"... stop; Moves directly to head/neck		
1st Rescuer: Completes cycle; Moves to chest		
2nd Rescuer: Checks pulse/breathing; Says "No Pulse! Continue CPR!"		
1st Rescuer: 5-compressions: "1&2&3&4&5"... stop		
2nd Rescuer: 1-ventilation; Maintains airway		
2nd Rescuer: Chest compressions/ventilations: 5:1-ratio		
Instructor's Initials:		

Foreign Body Airway Obstruction (Conscious):	Adult	Child	Infant
Ask "Are you choking?"			
Open airway; Assess breathing (Look, Listen, Feel); Confirm obstruction!			
Perform abdominal thrusts; Position[ ] Landmark[ ]			
or			
Perform chest thrusts (obese/pregnant); Position[ ] Landmark[ ]			
Perform up-to-5 back blows; Head supported[ ] Head lowered[ ] Ldmk[ ]			
Perform up-to-5 chest thrusts; Head supported[ ] Head lowered[ ] Ldmk[ ]			
Sequence: Continue			
Sequence: Continue up-to-5 back blows & up-to-5 chest thrusts			
Instructor's Initials:			

Foreign Body Airway Obstruction (Becomes Unconscious):	Adult	Child	Infant
Position victim; Verbalize need to activate EMS!			
Tongue-jaw lift; Adult-sweep[ ] Child/Infant-visualize[ ]			
Open airway; Attempt ventilation			
Reposition head; Re-attempt ventilation			
Perform up-to-5 abdominal thrusts; Position[ ] Landmark[ ]			
or			
Perform up-to-5 chest thrusts (obese/pregnant); Position[ ] Landmark[ ]			
Perform up-to-5 back blows; Head supported[ ] Head lowered[ ] Ldmk[ ]			
Perform up-to-5 chest thrusts; Head supported[ ] Head lowered[ ] Ldmk[ ]			
Tongue-jaw lift; Adult-sweep[ ] Child/Infant-visualize[ ]			
Sequence: Ventilate; Reposition; Ventilate; Thrusts; Check mouth			
Sequence: Vent; Reposition; Vent; 5-back blows; 5-chest thrusts; Chk mouth			
Verbalize need to activate EMS!			
Instructor's Initials:			

Foreign Body Airway Obstruction (Found Unconscious):	Adult	Child	Infant
Establish unresponsiveness; Verbalize need to activate EMS!			
Open airway			
Assess breathing (Look, Listen, Feel ... 3-5 seconds)			
Attempt to ventilate			
Reposition head; Re-attempt ventilation			
Perform up-to-5 abdominal thrusts; Position[ ] Landmark[ ]			
or			
Perform up-to-5 chest thrusts (obese/pregnant); Position[ ] Landmark[ ]			
Perform up-to-5 back blows; Head supported[ ] Head lowered[ ] Ldmk[ ]			
Perform up-to-5 chest thrusts; Head supported[ ] Head lowered[ ] Ldmk[ ]			
Tongue-jaw lift; Adult-sweep[ ] Child/Infant-visualize[ ]			
Sequence: Ventilate; Reposition; Ventilate; Thrusts; Check mouth			
Sequence: Vent; Reposition; Vent; 5-back blows; 5-chest thrusts; Chk mouth			
Verbalize need to activate EMS!			
Instructor's Initials:			

Mask/Barrier Device:	S U
Recovery Position:	S U

Positional Asphyxia - Sudden Death

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Police, sheriffs, and correctional officers have a limited and largely inadequate set of tools to use to safely subdue violent aggressive subjects. Through NIJ's National Law Enforcement Technology Center (NLETC), the Federal Government is working to identify and support the development of a range of less-than-lethal technologies - from those suitable for one-on-one encounters to those that might be used for stopping fleeing vehicles. In a recent analysis of in-custody deaths, we discovered evidence that unexplained in-custody deaths are caused more often than is generally known by a little-known phenomenon called positional asphyxia.

This NLETC article presents information relevant to positional asphyxia - i.e., death as a result of body position that interferes with one's ability to breathe - as it occurs within a confrontational situation involving law enforcement officers. We offer this information to help officers recognize factors contributing to this phenomenon and, therefore, enable them to respond in a way that will ensure the subject's safety and minimize risk of death.

This article identifies factors found to precipitate positional asphyxia, and provides recommendations for ensuring a subject's safety and advisory guidelines for care of subjects. Information regarding the collection of potential evidence in cases involving positional asphyxia is also included. Through officer awareness and resultant action, it is anticipated that deaths attributable to this cause will be reduced.

Sudden in-custody death is not a new phenomenon - it can occur at any time, for a variety of reasons. Any law enforcement agency may experience a sudden in-custody death, and while rare, such deaths appear to be associated most often with the following variables:

- *Cocaine-induced bizarre or frenzied behavior. When occurring while confined by restraints, cocaine-induced excited delirium (An acute mental disorder characterized by impaired thinking, disorientation, visual hallucinations, and illusions) may increase a subject's susceptibility to sudden death by effecting an increase of the heart rate to a critical level.*
- *Drugs and/or alcohol intoxication. Drug and acute alcohol intoxication is a major risk factor because respiratory drive is reduced, and subjects may not realize they are suffocating.*
- *Violent struggle extreme enough to require the officers to employ some type of restraint technique. Subjects who have engaged in extreme violent activities may be more vulnerable to subsequent respiratory muscle failure.*
- *Unresponsiveness of subject during or immediately after a struggle. Such unresponsive behavior may indicate cardiopulmonary arrest and the need for immediate medical attention.*

It is important to understand how preexisting risk factors, combined with the subject's body position when subdued or in transit, can compound the risk of sudden death. Information contained in this article may help to alert officers to those factors found frequently in deaths involving positional asphyxia.

Basic Physiology of a Struggle

A person lying on his stomach has trouble breathing when pressure is applied to his back. The remedy seems relatively simple: get the pressure off his back. However, during a violent struggle between an officer or officers and a suspect, the solution is not as simple as it may sound. Often, the situation is compounded by a vicious cycle of suspect resistance and officer restraint:

- A suspect is restrained in a face-down position, and breathing may become labored.
- Weight is applied to the person's back - the more weight, the more severe the degree of compression.
- The individual experiences increased difficulty breathing.
- The natural reaction to oxygen deficiency occurs - the person struggles more violently.
- The officer applies more compression to subdue the individual.

Predisposing Factors to Positional Asphyxia

Certain factors may render some individuals more susceptible to positional asphyxia following a violent struggle, particularly when prone in a face-down position:

- Obesity.
- Alcohol and high drug use.

- An enlarged heart (renders an individual more susceptible to a cardiac arrhythmia under conditions of low blood oxygen and stress.)

The risk of positional asphyxia is compounded when an individual with predisposing factors becomes involved in a violent struggle with an officer or officers, particularly when physical restraint includes use of behind-the-back handcuffing combined with placing the subject in a stomach-down position.

Advisory Guidelines for Care of Subdued Subjects

To help ensure subject safety and minimize the risk of sudden in-custody death, officers should learn to recognize factors contributing to positional asphyxia. Where possible, avoid the use of maximally prone restraint techniques (e.g., hog-tying). To help minimize the potential for in-custody injury or death, officers should:

- Follow existing training and policy guidelines for situations involving physical restraint of subjects.
- As soon as the suspect is handcuffed, get him off his stomach.
- Ask the subject if he has used drugs recently or suffers from any cardiac or respiratory diseases or conditions such as asthma, bronchitis, or emphysema.
- Monitor subject carefully and obtain medical treatment if needed.
- Be trained to recognize breathing difficulties or loss of consciousness and immediately transport the individual to the emergency room, or call for an emergency medical team (EMT) unit if such signs are observed.
- Obtain medial care upon subject's request.
- If the subject is turned over to a detention facility, inform the facility's custodians of any preexisting medical conditions (cardiac, respiratory) or that the subject requested or needed medical treatment because of respiratory difficulty or because he became unconscious.

Collection of Potential Evidence

Officers involved in confrontational situations should collect information that may later be of value in a civil or perhaps criminal action.

A use-of-force report should include details of how the individual was restrained. The following information should be included:

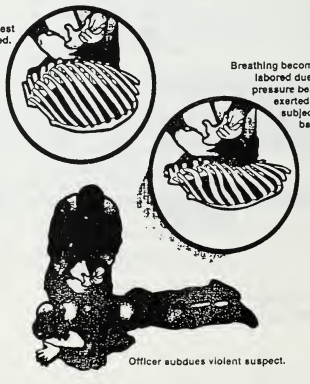
- What was the nature of the post-arrest restraint procedure? Identify whatever type of restraint (including chemical incapacitants) was used.
- How long was the subject face down and/or restrained?
- How was the subject transported, and in what position was the subject during transport?
- How long did the transport phase last, and what observations were made of the subject's condition?

To reasonably establish the cause of death or serious injury, a broad range of factors must be examined:

- Nature of the confrontation.
- Weapon(s), if any, employed by officers.
- Duration of the physical combat.
- System or type of post-arrest restraint employed.
- Transportation of the subject: destination, duration, mode of transport, and position of subject during transport.
- Emergency room observations and actions, name of attending medical personnel.
- Postmortem examination (autopsy) of subject: nature of injuries, diseases present, drugs present, and other physical factors.

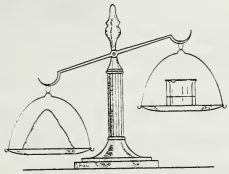
Conclusion

To help minimize the risk of positional asphyxia, diligent observation and monitoring of subjects displaying any one or a combination of the described



Scan 16-1
Diabetic Emergencies

HYPERGLYCEMIA

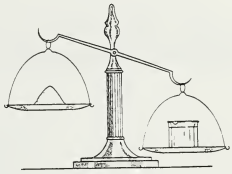


CAUSES
- The diabetic's condition has not been diagnosed and/or treated.
- The diabetic has not taken his insulin.
- The diabetic has overeaten, flooding the body with a sudden excess of carbohydrates.
- The diabetic suffers an infection that disrupts his glucose/insulin balance.

SIGNS AND SYMPTOMS
- Gradual onset of signs and symptoms, over a period of days
- Patient complains of dry mouth and intense thirst.
- Patient may appear to be intoxicated.
- Abdominal pain and vomiting common
- Gradually increasing restlessness, confusion, followed by stupor
- Coma, with these signs:
  - Signs of air hunger—deep, sighing respirations
  - Weak, rapid pulse
  - Warm, red, dry skin
  - Eyes that appear sunken.
  - Normal or slightly low blood pressure
  - Breath smells of acetone—sickly sweet, like nail polish remover

EMERGENCY CARE
- Administer a high concentration of oxygen.
- Immediately transport to a medical facility.
- Arrange for ALS intercept.

HYPOGLYCEMIA



CAUSES
- The diabetic has taken too much insulin.
- The diabetic has not eaten enough to provide his normal sugar intake.
- The diabetic has overexercised or overexerted himself, thus reducing his blood glucose level.
- The diabetic has vomited a meal.

SIGNS AND SYMPTOMS
- Rapid onset of signs and symptoms, over a period of minutes
- Dizziness and headache
- Abnormal hostile or aggressive behavior, which may appear to be acute alcoholic intoxication
- Fainting, seizures, and occasionally coma
- Normal blood pressure
- Full, rapid pulse
- Patient intensely hungry
- Skin cold, pale, and clammy; perspiration may be profuse
- Copious saliva, drooling

EMERGENCY CARE
- Conscious Patient—Administer granular sugar, honey, Lifesaver or other candy placed under the tongue, orange juice, or glucose.
- Unconscious Patient—Avoid giving liquids; provide "sprinkle" of granulated sugar under tongue, or dab of glucose if protocols permit.
- Turn head to side or place in lateral recumbent (recovery) position.
- Provide a high concentration of oxygen.
- Transport to a medical facility.
- Arrange for ALS intercept.

SPECIAL NOTES: HYPERGLYCEMIA AND HYPOGLYCEMIA

When faced with a patient who may be suffering from one of these conditions . . .
- Determine if the patient is diabetic. Look for medical identification medallions, insulin in the refrigerator, or information cards; interview patient and family members.
- If the patient is a known or suspected diabetic, and hypoglycemia cannot be ruled out, assume that it is hypoglycemia and administer sugar.

Often a patient suffering from either of these conditions may simply appear drunk. Always check for other underlying conditions—such as diabetic complications—when treating someone who appears intoxicated.

Shock

Definition: Shock is a depressed state of body function with inadequate tissue perfusion due to the lack of sufficient oxygenated blood circulation to the brain and body.

Signs and symptoms:

Pulse - rapid and weak - "thready"

Respiration - shallow and rapid,
irregular, difficult, labored or gasping

Skin - Color - pale or blue (cyanotic)
Condition - wet or dry - warm or cool

Eyes - vacant, lackluster, glassy or dazed - "spacey"

Pupil reaction - dilated

State of consciousness - varies - confused, dizzy, dazed, lack of mental alertness, feeling faint, weak, decreased responsiveness, unconscious

Nausea or vomiting

Restless Anxious Thirsty

These 3 symptoms frequently show up before the others and also frequently indicate an internal abdominal injury.

Blood pressure - dropping

THIS IS A LATE SIGN, WHEN SHOCK IS ALREADY PRESENT!

Treatment - Treat for Shock to prevent or minimize

Fix Life Threats - ABC's

Maintain body warmth, keep comfortable

Administer 100% oxygen by non-rebreather

Lying down unless cardiac problem

Give nothing to eat or drink

Prompt ALS, Consider Air Evacuation

SOR/epc
930921
Shock005

Oxygen Flow Rates

for masks and cannulas to provide supplemental oxygen to a spontaneously breathing patient.

Common Prehospital Devices

Device	*Flow Rate*	*% Oxygen Delivered*	*Comments*
Nasal Cannula	1–6 lpm	22–40	Usually well-tolerated and less constricting than masks. Each LPM up = approx. 4 % increase.
Face Mask	4–10 lpm	40–60	Slightly constricting for some patients.
Non-Rebreathing Mask	Whatever it takes to keep the bag inflated! Usually 10–15 lpm	90–100	Device of choice for patients at risk of shock or hypoxia.

Other Devices

The following devices are not commonly found in the pre-hospital environment but you may encounter them during inter-facility transfers.

Device	*Flow Rate*	*% Oxygen Delivered*	*Comments*
Face Tent	4–8 lpm	35–60	Allows high humidity.
Partial-Rebreathing Mask	6–10 lpm	35–60	Conserves oxygen over long duration use.
Venti-Mask (Venturi) Nozzle indicates % and lpm.	4 or 8 lpm	24, 28, 35, 40, etc.	Used most commonly for long term treatment of COPD patients in hospital or nursing home.
Oxygen Catheter	As prescribed	As prescribed	Rarely Used. Set flow as prescribed by MD.

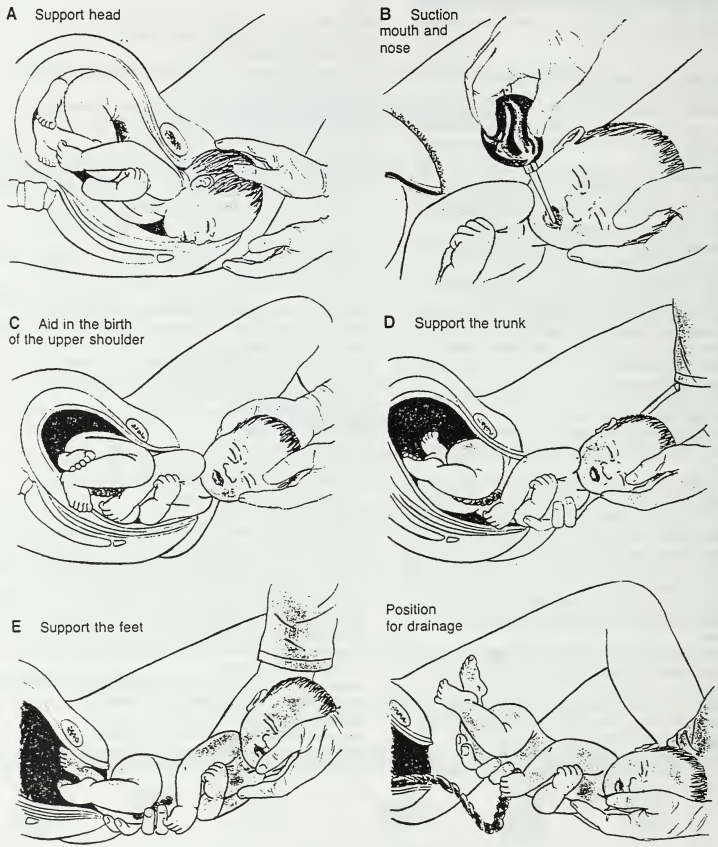
CHAPTER REVIEW

KEY TERMS

You may find it helpful to review the following terms.

abortion—spontaneous (miscarriage) or induced termination of pregnancy.
abruptio placentae (ab-RUP-she-o plah-SEN-ti)—a condition in which the placenta separates from the uterine wall; a cause of excessive prebirth bleeding.
afterbirth—the placenta, membranes of the amniotic sac, part of the umbilical cord, and some tissues from the lining of the uterus that are delivered after the birth of the baby.
amniotic (am-ne-OT-ic) **sac**—the "bag of waters" that surrounds the developing fetus.
breech presentation—when the baby appears buttocks or both legs first during birth.
cephalic (se-FAL-ik) **presentation**—when the baby appears head first during birth. This is the normal presentation. Also called a *vertex presentation.*
cervix (SUR-viks)—the neck of the uterus that enters the birth canal.
crowning—when part of the baby is visible through the vaginal opening.
eclampsia (e-KLAMP-se-ah)—a severe complication of pregnancy that produces convulsions and coma.
ectopic (ek-TOP-ik) **pregnancy**—when implantation of the fertilized egg is not in the body of the uterus, occurring instead in the oviduct (fallopian tube), cervix, or abdominopelvic cavity.
false labor—contractions that occur at any time during pregnancy caused by changes in the uterus as it adjusts in size and shape; also called Braxton-Hicks contractions.
fetus (FE-tus)—the baby as it develops in the womb.
induced abortion—delivery of a fetus as a result of deliberate actions that are taken to stop the pregnancy.
labor—the three stages of delivery that begin with the contractions of the uterus and end with the expulsion of the placenta.
meconium staining—amniotic fluid that is greenish or brownish-yellow rather than clear; an indication of possible fetal distress during labor.
miscarriage—see *spontaneous abortion.*
multiple birth—when more than one baby is born during a single delivery.
perineum (per-i-NE-um)—the surface area between the vulva and anus.
placenta (plah-SEN-tah)—the organ of pregnancy where exchange of oxygen, foods, and wastes occurs between mother and fetus.
placenta previa (plah-SEN -tah PRE-vi-ah)—a condition in which the placenta is formed in an abnormal location (usually low in the uterus and close to or over the cervical opening) that will not allow for a normal delivery of the fetus; a cause of excessive prebirth bleeding.
pre-eclapmsia (pre-e-KLAMP-se-ah)—a complication of pregnancy that can lead to convulsions and coma.
premature infant—any newborn weighing less than 5.5 pounds or being born before the 37th week of pregnancy.
prolapsed umbilical cord—when the umbilical cord presents first and is squeezed between the vaginal wall and the baby's head.
prolonged delivery—when birth is delayed more than 20 minutes after contractions are 2-to-3 minutes apart.
spontaneous abortion—when the fetus and placenta deliver before the 28th week of pregnancy; commonly called a *miscarriage.*
stillborn—born dead.
supine hypotensive syndrome—dizziness and a drop in blood pressure caused when the mother is in a supine position and the weight of the uterus, infant, placenta, and amniotic fluid compress the inferior vena cava, reducing venous return to the heart and reducing cardiac output.
umbilical (um-BIL-i-cal) **cord**—the fetal structure containing the blood vessels that travel to and from the placenta.
uterus (U-ter-us)—the muscular abdominal organ where the fetus develops; the womb.
vagina (vah-JI-nah)—the birth canal.
vernix (VER-niks)—the slippery protective coating that covers a baby when it is born.
vulva (VUL-vah)—the female external genitalia.

Scan 18-1
Normal Delivery



Note: Assist the mother by supporting the baby throughout the birth process.

Patient Care—Face or Limb Presentation

Emergency Care Steps

When you discover a face or limb presentation or wedged shoulders

1. If there is a prolapsed cord, follow the same procedures as you would for any delivery involving a prolapsed cord. Remember, you have to keep pushing up on the baby until relieved by a physician. The baby must be kept off of the cord if it is to survive.
2. If the head delivers but the shoulders become wedged, wipe and suction the baby's mouth and be very careful not to aggravate the situation during transport.
3. Transport the mother immediately to a medical facility.
4. Keep the mother in a left lateral recumbent position with her feet slightly elevated or in the delivery position (follow local guidelines).
5. Administer a high concentration of oxygen.

Remember: For a limb presentation, *do not* try to pull on the limb or replace the limb into the vagina. If shoulders are wedged, *do not* pull on the baby's head. *Do not* place your gloved hand into the vagina, unless there is a prolapsed cord.

Multiple Birth When more than one baby is born during a single delivery, it is called a **multiple birth.** A multiple birth, usually twins, is not considered to be a complication, provided that the deliveries are normal. Twins are generally delivered in the same manner as a single delivery, one birth following the other.

Figure 18-19 Limb presentation.

Patient Assessment—Multiple Birth

If the mother is under a physician's care, she will probably be aware that she is carrying twins. Without this information, you should consider a multiple birth to be a possibility if the mother's abdomen appears unusually large before delivery, or it remains very large after delivery of one baby. If the birth is multiple, labor contractions will continue and the second baby will be delivered shortly after the first. The second baby may present in a breech position, usually within minutes of the first birth. The placenta or placentas are delivered normally (Figure 18-20).

Patient Care—Multiple Birth

Emergency Care Steps

When assisting in the delivery of twins

1. Clamp or tie the cord of the first baby before the second baby is born.

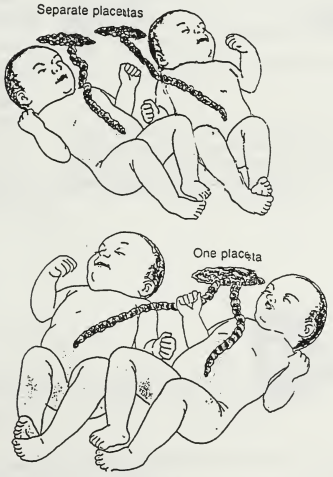


Figure 18-20 Multiple births.

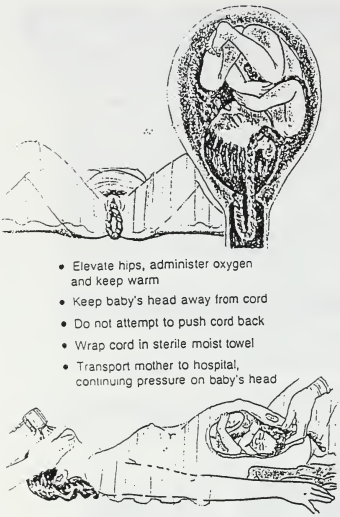


Figure 18-17 Prolapsed umbilical cord.

the obstetric kit. The cord must be kept warm or spasms may occur and interrupt circulation. The best results are obtained if this towel is kept moist with *sterile saline* and wrapped again with a dry towel to prevent evaporative heat loss.

5. *Insert several fingers of a gloved hand into the mother's vagina* so that you can gently push up on the baby's head or buttocks to keep pressure off of the cord. You will be pushing up through the cervix. This may be the only chance that the baby has for survival, so continue to push up on the baby until you are relieved by a physician. You may feel the cord pulsating when pressure is released.

Face or Limb Presentation In some presentations, the baby cannot be born without special assistance, possibly a cesarean section at the hospital. Presentation of the infant's face, brow, or chin may cause extreme hyperextension of the neck. If birth progresses, the neck will fracture. On rare occasions, a baby will have shoulders too large to fit through the pelvic bones (symphysis pubis) and the hollow of the sacrum. If one or more limbs present there is often a prolapsed umbilical cord. These are TRUE EMERGENCIES.

Patient Assessment—Face or Limb Presentation

When checking for crowning, you may notice the presentation of the infant's face, brow, or chin, or you may see (Figure 18-19) an arm, a leg, or an arm and leg together, or a shoulder and an arm. If one or more limbs present, there is often a prolapsed umbilical cord as well. Rarely, with symphysis pubis, you will find that the head has delivered but the shoulders have become wedged.

Figure 18-18 The knee-chest position can be used in the event of a prolapsed umbilical cord.

DIAGNOSTIC SIGNS

SIGN - Rescuer sees, hears, feels

SYMPTOM - What patient tells you about him/herself;
Patient says - I feel nauseous, my back hurts.

PULSE - Pressure wave generated by the heart beat; carried along the arteries.

Normal rate adult = 60 - 80 per minute
Normal rate child = 60 - 100 per minute

PULSE CHARACTER

A. Absent
B. Slow or Fast
C. Weak or Bounding
D. Irregular

RESPIRATIONS: The act of breathing, can vary greatly - usually 12 - 20 breaths per minute

A. Absent
B. Slow or Fast
C. Shallow or deep
D. Gasping, Labored, choking

BLOOD PRESSURE; Pressure that the circulating blood exerts against the artery walls.

A. SYSTOLIC = Contraction of heart
B. DIASTOLIC = Relaxation of heart

OFFICER SURVIVAL

Tactics for Plainclothes and Off-Duty Officers

III

POLICE

DON'T

MOVE

THE FACTS

- **IN THE UNITED STATES, 15 CHILDREN UNDER 19 YEARS OLD ARE KILLED FROM HANDGUNS EVERY DAY**
  (National Center for Health Statistics)

- **MORE CHILDREN ARE NOW KILLED BY HANDGUNS THAN ALL NATURAL CAUSES COMBINED**
  (Centers for Disease Control)

- **IN 1992, THERE WERE 37,776 DEATHS FROM FIREARMS, 103 EVERY DAY**
  (National Center for Health Statistics)

- **GUNS KEPT IN THE HOME FOR SELF PROTECTION ARE 43 TIMES MORE LIKELY TO KILL A FAMILY MEMBER, FRIEND OR ACQUAINTANCE THAN A CRIMINAL**
  (New England Journal of Medicine, 6/86)

- **GUNS ARE NOT REGULATED BY THE CONSUMER PRODUCT SAFETY COMMISSION**
  (Consumer Product Safety Commission)

- **GUNSHOT WOUNDS ARE PROJECTED TO COST THE NATION $4 BILLION IN DIRECT HEALTH CARE EXPENDITURES IN 1995**
  (Journal of The American Medical Association 6/95)

STOP HANDGUN VIOLENCE, INC. 29 CRAFTS STREET SUITE 300 NEWTON MA 02158 (617) 965-4636

PARENTS

As the primary educators of children, parents have a major part in preventing gun violence. Parents may start to reduce children's risks by taking these four steps:

1. ***The single most important step is to keep guns away from children.***

The safest thing for your family is not to keep a gun in the home. But, if you keep a gun at home, unload it and lock it away. Separate the ammunition.

A gun in the home significantly increases risks for suicide, domestic homicide and accidents.

2. ***Make sure that your children know the dangers of guns and not to touch or handle guns.***

Too often we assume that children will know what to do if they see a gun at someone's home or elsewhere in the community. Yet, many children and teens do not realize that handling a gun just once could lead to tragedy.

When children come across an unsupervised gun, or another child with a gun, they should not touch the gun and should immediately get help from a parent or trusted adult.

3. ***Talk to your children about guns and violence. Explain to them that we all have strong emotions like anger and fear, but that these feelings can be expressed without striking out at others or using weapons.***

Demonstrate healthy ways to express anger and disagreement. Support your children when they have used positive means of resolving conflict, like:

- ☆ Talking about feelings, rather than acting them out;
- ☆ Making choices to avoid fights;
- ☆ Getting help from trusted adults.

4. ***Talk to your children about the differences between media violence and violence in real life.***

Watch television and movies with your children and help them to understand that what they see is not real. Explain that in reality guns can kill or cause long-term disabilities.

Center to Prevent Handgun Violence
1225 Eye Street, NW, Suite 1100, Washington, DC 20005 • (202) 289-7319
10951 W. Pico Blvd., Suite 204, Los Angeles, CA 90064 • (310) 475-6714
29 South LaSalle, Suite 1095, Chicago, IL 60603 • (312) 920-0504

You may never be off-duty

Continued from page one

ficer who had the authority but failed to act.

Some of you might say, "What could he do?" If he pulled his weapon out, he might have gotten into a shootout and perhaps several dozen would have been killed and he would have been sued! This is the perfect example of "damned if you do, damned if you don't."

Do too much and you get sued. Do too little and you get sued. The best legal advice: use your common sense. If you feel like you're out on a limb, you probably are.

The policy taught from the first day of the academy is to avoid off-duty incidents and always call 911 prior to taking any action. There was an officer in California who watched a grocery store robbery, took a position behind the robber, drew his weapon and identified himself, only to get shot in the back of the head by an accomplice who was disguised as another customer in line. Keeping these things in mind and having "a plan" will often help you avoid liability if you can show a reason why you did what you did and a jury thinks it was reasonable!

Aside from the obligations, what authority do you have? Like most states, Washington law has examined the issue of off-duty status in several cases. In a 1983 case, the State Supreme Court held an off-duty officer has the same authority as an on-duty officer to make an arrest. It made that determination in upholding the conviction of a man arrested by an officer who was at home, off-duty and observed criminal activity through his apartment window.

Laws in the State of Washington make no distinction between on-duty and off-duty. It simply gives a police officer, deputy sheriff or marshall, police authority and sets the conditions for making arrests. The law does indicate that limited commission or reserve officers only have police powers while "on-duty" working pursuant to official orders.

The same law also gives officers the right to carry where in Washington State both on and off-duty and no concealed weapon license is required. The right to carry firearms is extended for two reasons: carrying out official duties (e.g., arrests) and protection (e.g., when the bad guy finds out where you live).

Most departments have enacted policies for off-duty activity, especially when it comes to arrest and firearms. Be sure to review your agency's policy and stay within the guidelines to avoid difficulties. If you are within policy, qualified immunity and indemnification are much easier to obtain.

When off-duty, be sure to carry handcuffs or some type of restraints like flex cuffs. A recent California case held an off-duty officer liable when he failed to restrain his arrestee and that person injured a bystander trying to get away.

Always carry your badge to provide easily recognized identification. Clip it to your belt next to the firearm. If a citizen sees the weapon through an open coat, they will also see the badge.

Most department policies are clear that if you are carrying a firearm you will not consume alcoholic beverages to the point of intoxication. It's probably best simply not to drink while armed because any odor of intoxicants after a shooting will give some plaintiff attorney a run at your physical condition and put you on the

Are you ever off-duty?

by J.C. Becker, Esq.

We all know the department sets the conditions of employment. The authority that gives you the right to pull people over, point your gun and take them to jail, comes from your employer.

But at what point does the job end and your private life begin?

Unlike an off-duty construction worker who sees a hole in the ground and feels no obligation to fill it, you may come across a serious incident off-duty that prompts you into action.

Your failure to act may in itself be the basis for liability as it was several years ago in New York City for an officer who was present when a bar got robbed, took no action while the robbers attacked several patrons and was ultimately sued when it was learned that he was an armed, off-duty police of-

Continued on page 10

Above and Beyond the Call of Duty

Preventing Off-duty Officer Deaths

By EDWARD F. DAVIS, M.A. and ANTHONY J. PINIZZOTTO, Ph.D.

Photo © Peggy Harrison, The National Law Enforcement Officers Memorial

One night, an off-duty police officer visited a local bar and grill. While seated at the bar, he observed two men approach the bartender. With guns drawn, the subjects demanded cash from the register. At this point, the off-duty officer drew his service revolver, shouting "Police!" as he did so.

While the officer may have thought he had the situation under control, he was shot and killed by a third subject whom he apparently had not identified as part of the robbery team. The shooter had entered the bar and stood apart from the two other robbers to cover the escape route. All three subjects did escape, but later were identified, arrested, tried, and convicted.

As this case illustrates, for the men and women performing law enforcement duties in the United States, personal safety is more than a routine concern. Statistics support this conclusion. The 1993 edition of the FBI's annual publication, *Law Enforcement Officers Killed and Assaulted* (LEOKA),[1] indicated that in 1992, 70 city, county, and state officers were feloniously killed in the line of duty, and 66,975 officers were assaulted while performing law enforcement functions both on and off duty.

Indeed, few criminals work a 9-to-5, 8-hour shift. Even when law enforcement officers are "off the clock," they still may face dangerous confrontations with armed subjects. In fact, law enforcement officers often lose their lives attempting to enforce the law while off duty.

How frequently do killings of off-duty law enforcement officers occur? According to LEOKA, from 1975 to 1985, 130 off-duty officers were feloniously killed. The period from 1991 to 1993 saw 35 officers feloniously killed while off duty.

Mr. Davis

Dr. Pinizzotto

Mr. Davis and Dr. Pinizzotto serve in the Behavioral Science Unit at the FBI Academy.

The largest number of deaths in this 3-year period (15) occurred when officers intervened in robberies. The other 20 off-duty officers died under the following circumstances: 8 in ambush, 4 while investigating suspicious persons/circumstances, 3 during other arrest situations, 2 while handling disturbance calls, 2 while initiating traffic pursuits/stops, and 1 during a burglary in progress.

To delve deeper into the nature of police officer killings, the FBI's Criminal Justice Information Services (CJIS) Division conducted a study into 51 cases in which 50 offenders killed 54 law enforcement officers.[2] Of the 54 victims, 2 were off duty when they were involved in law enforcement actions that resulted in their deaths.

This article reviews the two cases from the CJIS study and then examines several more recent incidents where off-duty officers have lost their lives while enforcing the law. Finally, it offers advice for law enforcement agencies on how to prevent these tragedies from occurring.

Interviews with Cop Killers

The CJIS study included interviews of the perpetrators who killed the two off-duty officers.[3] Although as a general rule, investigators question the truthfulness of such offenders, their accounts of the actual shootings are, for the most part, consistent with both the forensic evidence and investigative reports from each incident. For this reason, their comments may provide insight into their actions and help formulate a law enforcement response to such incidents.

In the case outlined in the opening scenario of this article, the killer told investigators that he had entered the bar before his partners to avoid being seen with them. The plan called for him to walk away during the confusion, after the other two had made their escape. Although they had anticipated resistance from the restaurant management, they had not expected the presence of an off-duty officer. The assailant stated that he did not hear the officer shout "Police," but admitted that it would not have made a difference. He had entered the bar prepared to shoot, and when he observed a man with a gun, he shot him.

The killer also advised that even if the officer had waited for his partners to get the money and start to leave before making an effort to arrest them, he still would have shot him. The shooter believed that the only thing the officer could have done to avoid physical injury would have been to remain seated, observe, and not take action. In fact, he said, the trio had no intentions of robbing the customers of the restaurant.

In the second case, an officer became the victim of a carjacking. Off duty and out of uniform, the officer was driving to a shopping center with his wife when they were stopped by four men. The men opened the car doors and physically removed the couple. One subject had a revolver pointed at the officer. The officer identified himself as a police officer and drew his service revolver. Although he was shot immediately and subsequently died, the officer did manage to shoot one of the carjackers.

When interviewed, the officer's killer stated that he and his cohorts would not have harmed the officer and his wife if they had not resisted. In the shooter's opinion, the officer never should have drawn his weapon against four subjects, one of whom was armed. Instead, he said, the officer should have waited for the subjects to leave the scene, then phoned in a description of them and the stolen vehicle.

Unfortunately, the officers involved in these tragic incidents are not alive to tell their side of the story. One thing is certain, however. At the

time of their deaths, their departments did not have established procedures for how officers should perform police functions while off duty—procedures that might have saved their lives. Both departments did, however, require that their officers be armed while off duty.

Unarmed, Off-duty Confrontations

The question of whether officers should be armed while off duty has been the subject of considerable debate. While such policies are left to the discretion of individual agencies, the fact remains: Unarmed, off-duty officers still take law enforcement action and sometimes get killed.

One such case occurred in 1994 and involved a recent graduate from the police academy. Although he was off duty, not in uniform, and unarmed when he witnessed an armed robbery at a grocery store, he pursued the offender, confronting him in the store parking lot. The officer attempted to arrest the robber, was shot once in the chest, and died shortly thereafter. The killer fled the parking lot on foot and escaped, but subsequently was arrested and charged with robbery and murder.

In another 1994 case, the victim, an 11-year police veteran, was off duty and shopping in a grocery store with his wife when he observed a robbery in progress. Though unarmed, he attempted to disarm and physically restrain the robber. A violent struggle ensued, during which both the officer and the robber crashed through a store window. The robber then fired one round from a sawed-off shotgun, striking the officer in the chest, killing him. The robber escaped, but later was captured, arrested, and charged with murder.

In these cases, the two officers' experience levels ranged from almost none to 11 years. Yet, both officers chose to intercede in an armed robbery while off duty and unarmed. Although neither victim's department required officers to remain armed while off duty, each department had a different policy regarding off-duty confrontations.

> ***"Another important area of consideration is how off-duty officers should react if they become victims of a crime."***

One department trained and encouraged officers to be good eyewitnesses while off duty, but warned against taking police action if doing so would place them or the public at risk. The other department's orders stated that if off-duty officers observed violations of the law in their jurisdictions, they should take "proper" police action. However, this order did not indicate what proper police action might be in any given set of circumstances.

Ambushed at Home While Off Duty

As is the case for an increasing number of citizens, home is not always a safe haven for off-duty police officers. Since 1994, two off-duty officers have been feloniously killed at their residences. In 1994, an officer with 7 years of law enforcement experience was in his home when someone outside called for him to come out. When he did, he was shot 14 times with two handguns and a shotgun. The four subjects being sought for the slaying remain at large.

In a 1995 case, an off-duty, 12-year veteran detective answered a knock on the door of his residence. Upon opening the door, he was shot and killed by one of three men. When arrested, the three men revealed that they had been contracted to kill the detective in order to prevent him from testifying in a pending court case.

Both of these cases beg the question: How did the killers learn where the officers lived? While the answer remains under investigation, clearly, departments need to protect the home addresses of their officers.[4]

On-duty Officers Killing Off-duty Officers: Cases of Mistaken Identity

If there could be a degree of tragedy added to the death of an off-duty officer, it is when one officer is killed mistakenly by another. For various reasons, not all of these accidental deaths have been reported to the FBI's Uniform Crime Reporting Program. According to available statistics, from 1990 until 1993, 11 on- and off-duty officers were shot and killed by other officers.

In a 1995 case, an off-duty officer in a large eastern city was in the company of his girlfriend and her two young children when he observed two armed men attempting to rob a taxi driver. The officer decided

to take police action. He drew his service weapon and approached the robbers. He identified himself as a police officer, and the three faced one another with guns drawn.

An on-duty, uniformed patrol officer observed these individuals, all with guns drawn, standing around the cab. The on-duty officer approached with his gun drawn and demanded that the three individuals drop their weapons. The two robbers immediately obeyed the order, but the off-duty officer did not and, instead, turned toward the on-duty officer. Fearing for his life, the on-duty officer fired, killing the off-duty officer.

The robbers fled, but subsequently were arrested. The on-duty officer has been on medical leave since the incident. Both officers had worked in the same police district for 3 years, but due to the size of their district and their different work schedules, they never knew each other.

Another case of mistaken identity, which involved officers from different departments, started when one department received a telephone report of a residential burglary. The caller stated his name and address and reported that he had observed several young men force open the rear window of a neighbor's home and enter the residence. Although the caller could not give the address, he stated that he would show the responding officers the house.

The dispatcher broadcast the burglary call, and an officer volunteered to respond. At the scene, the officer contacted the complainant, who showed him the house that the young men had entered. The complainant advised the officer that he did not know who owned or lived in the house. Nor did he know whether the burglars were still on the premises.

The officer left the complainant and parked his patrol car about 300 yards from the house. He walked to the rear of the building and discovered an open window. After calling for backup and a K-9 patrol unit, he continued to check the rear of the home. While standing beside an open window, he saw a person's shadow. He then observed what seemed to be the shadow of a gun in the person's hand. A man appeared in the window and started to point the gun in the officer's direction. The officer fired one round, striking the subject and knocking him to the floor. The officer sought cover and notified the police dispatcher of the shooting and that the gunman remained in the house.

Numerous officers responded and surrounded the house, convinced that a barricade situation had developed. After learning that the house was owned and occupied by a police officer from a neighboring jurisdiction, the police entered the house and found the owner dead on the floor, shot once by the first responding officer.

The victim had been at work when contacted and advised that burglars had broken into his home. Going off duty, he drove home to investigate, but did not notify the local police department. A heavy overcoat concealed his police uniform.

Several years later, FBI investigators[5] interviewed the officer who had fired the fatal round. He related that on the night of the incident, he had been assigned as an "overlap," or extra, officer and had been scheduled to take leave during the second half of his shift. Hearing the call for a burglary, he volunteered, thinking that after he had responded to the call and completed the paperwork, his shift would be over. He stated that even though he had called for backup at the scene, he thought the house was empty. Then, he had seen a person's shadow in the window. He had hoped that the person inside would back away from the window, to allow him to seek cover. But when the individual appeared to point the gun toward him, he fired one round and retreated.

While investigating the incident, the officer's department relieved him of his official police powers. After a very lengthy judicial process, he returned to duty. However, 7 years later, his department still refuses to return him to patrol; he remains on administrative duty.

Law Enforcement's Response

In response to both on- and off-duty deaths, law enforcement agencies throughout the country have developed safety training programs to help officers survive potentially deadly encounters with armed offenders. Still, the number of assaults and killings has not been reduced significantly, and in some areas, has increased.

Off-duty homicides can be particularly devastating, especially if the incident could have been avoided. Each agency should have a well-defined policy that clearly explains what, if any, law enforcement functions off-duty officers must perform. Such a policy should not conflict with other departmental edicts. For example, if an agency requires its officers to be "on-duty" 24 hours a day, then a rule that forbids off-duty officers to carry weapons would be contradictory and unadvisable.

Regardless of whether departments expect officers to carry firearms while off duty, they should make all employees aware of the policy. Additionally, off-duty officers who remain armed should be required to qualify with the off-duty weapon if it is a personally owned rather than the department-issued service weapon.

The departmental policy also should address how off-duty officers should act when observing an offense on their assigned beats, as well as in other jurisdictions. Another important area of consideration is how off-duty officers should react if they become victims of a crime. In addition to establishing a policy for officers, the department should strongly encourage officers to develop a plan of action for their families, clearly covering what each family member should say or do if the family becomes drawn into a crime in progress.

For example, each family member old enough to use the telephone should know how to contact the emergency police dispatcher and relay the appropriate information. In some cases, simply reporting the fact that one or both parents are off-duty officers, the name of their agency, and the fact that they have a problem may save a life.

> ***"Each agency should have a well-defined policy that clearly explains what, if any, law enforcement functions off-duty officers must perform."***

Whether crime victims or witnesses, armed, off-duty officers run the risk of being confronted by on-duty officers. Agencies should develop and articulate a procedure for off-duty officers to follow during such circumstances, stressing that armed, off-duty officers *never* should turn toward armed, on-duty officers.

Finally, the department should ensure that the personal information of all departmental employees remains confidential. No one should have access to personal information, such as a home address, without the employee's permission.

Conclusion

Law enforcement officers frequently are killed in the line of duty. While off-duty officers are murdered less frequently, these incidents can be even more disconcerting to a department unprepared to deal with them. In fact, many off-duty homicides may be avoided if departments prepare officers in advance to handle confrontations with armed offenders.

Every department should institute a policy that outlines whether off-duty officers should carry weapons, what they should do if they witness a crime or become victims of crime, and how to handle encounters with on-duty law enforcement officers. Off-duty officers who confront dangerous criminals show a dedication to duty that few employees possess. They should not have to die for it. ✦

Endnotes

[1] U.S. Department of Justice, *Law Enforcement Officers Killed and Assaulted* (Washington, DC: U.S. Department of Justice, 1993).

[2] U.S. Department of Justice, *Killed in the Line of Duty: A Study of Selected Felonious Killings of Law Enforcement Officers* (Washington, DC: U.S. Department of Justice, 1992).

[3] The authors conducted these interviews while serving in the CJIS Division.

[4] In some states, members of the public can obtain the addresses of law enforcement employees through avenues such as voter registration lists and courthouse precinct records. Exceptions for law enforcement, which mandate including a post office box in lieu of an actual street address, can be made only through appropriate legislation.

[5] The authors conducted this interview.

OFF-DUTY POLICE OFFICERS

KILLED IN THE LINE OF DUTY

1975 - 1985 130 Off-duty Officers Were Killed

1991 - 1993 35 Off-duty Officers Were Killed

15	Intervening in robberies
8	Ambushed
4	Investigating suspicious persons
3	During other types of arrests
2	Investigating disturbances
2	Traffic stops
1	Burglary in progress

AT LEAST 20% OF ALL POLICE OFFICERS KILLED IN THE LINE OF DUTY WERE OUT OF UNIFORM AT THE TIME OF THEIR DEATHS

Identification When Not In Uniform

In every study case where the victim officer was not in uniform, the offenders claimed that they did not know the victim was a law enforcement officer. In the cases involving the sale or distribution of drugs, the killers' defense at the time of the trial was that they were afraid that they were being robbed by another drug dealer. This defense can be seen time after time in criminal trials attempting to justify a defendant's actions when officers are not in uniform. One of the killers said, "It's not acceptable to yell, 'Police, freezel' or 'Police, hands up!' because when someone is yelling at me and pointing a weapon, the only thing I hear them saying is'Give me your money. Give me your drugs.'" Although this may be seen as a justification on the part of the offender for killing the officer, and even though one may doubt the veracity of this statement, a lesson could be extracted from these comments. Specifically, that law enforcement give consideration to a two-sense identification, both a visual display and a verbal command (i.e., a raid jacket and a verbal command). How an officer presents himself or herself when not in uniform could mean the difference between life and death. In one of the cases examined, the victim officer was in the company of two other officers. They were dressed in plaid shirts and blue jeans. They were approaching a marijuana field under cultivation when observed by the eventual killer. The killer, unknown to the police, had been involved in a gun fight the day before with a rival drug dealer. The offender allegedly thought these officers were men hired by a rival drug dealer to settle accounts. He claimed that there were no visual means by which to identify the officers as members of any law enforcement agency. The victim's department now issues clearly marked raid jackets to be used by officers not in uniform.

While not clearly identified as law enforcement, officers have also been killed accidentally by fellow officers. This misidentification has occurred most frequently during interventions in armed robberies or arrest situations. A clear benefit of the raid jacket or other obvious law enforcement symbol is the elimination of the possibility of misidentification of an officer as a suspect. When multiple-agency operations are being performed, clear identification of the officers involved is essential.

Off-Duty Performance

How are officers trained to act when they come upon a crime scene when off duty? In one of the cases examined, an officer was present when several people attempted to rob a restaurant/bar. The victim in this case was not aware that there were three offenders involved in the robbery. The officer jumped up from his table, and while attempting to draw his gun, announced that he was a police officer. He commanded two of the offenders to drop their weapons. He was shot and killed by a third robber he didn't recognize as such. Would it have been wrong for this officer to act as a witness in this case? Might it have been more prudent to take note of the description of the robbers and only act when the robbers started to flee the scene? Wasn't the situation exacerbated and innocent lives placed in jeopardy unnecessarily by the officer taking aggressive action in a crowded bar? Some departments provide little training and direction in this matter, and yet others spend hours instructing their officers in off-duty procedures.

N.Y. officer shot by colleagues says they didn't issue warning

By Rayner Pike
ASSOCIATED PRESS

NEW YORK – A black undercover policeman shot by white colleagues who had mistaken him for a robber said yesterday that he had recognized the officers and that they had never shouted a warning.

The transit officer, Derwin Pannell, offered his version of the Nov. 17 shooting at a news conference in a hospital. He was in a wheelchair, a bullet still in his neck and his paralyzed right arm propped on the chair's armrest.

"I'm in a lot of pain and anguish," he said.

Pannell, 27, was shot as he and his partner, Kenneth Donnelly, were taking a fare-beating suspect into custody outside a subway station.

The Transit Authority said the shooting was an accident, as the three white officers believed a robbery was in progress. Pannell was holding a gun on the woman while Donnelly, who is white, went through her purse.

Pannell said he did not view the shooting as "a racial incident," but he accused the Transit Authority of failing to provide race-sensitivity training that would have helped officers distinguish between a criminal and an undercover officer.

He also said he was new to undercover work and had not been advised to wear "the color of the day," a marker to help other officers recognize undercover collegues.

While Donnelly searched the woman's purse, Pannell said he kept his gun out and stayed on the lookout for a second fare-beating suspect, a man who had fled, Pannell said.

He said he heard something behind him and turned toward the noise, "thinking that the male perpetrator was back and could possibly be armed."

No one yelled "Police, don't move!" or "Police, freeze!" he said.

"To my relief, I clearly observed Barbara Jesberger and John Napolitano . . . I recognized both of them as fellow officers, even though they never identified themselves as such.

AP PHOTO

Derwin Pannell, a New York transit officer shot by colleagues, and his wife, Diane, face reporters yesterday at a hospital news conference.

"Having failed to identify themselves as police officers, I assumed that they too recognized me.

"Upon recognizing them, I felt safe and holstered my .38 . . .. I then placed my empty hand back down my right side," Pannell said.

But the next thing he saw was Napolitano and a third officer, Robert Green, crouched, "at point-blank range, in a combat stance, with their guns pointed directly at me.

"I covered my vitals, went into a fetal position and was shot," Pannell said. The officers unleashed 21 rounds of gunfire.

During the shooting, Pannell said he heard Donnelly yell, "What are you doing? We're cops."

Perry Weitz, one of Pannell's lawyers, said the officers "flagrantly disregarded proper police procedures" by not identifying themselves.

Pannell has filed a $70 million lawsuit against the city because the officers who shot him had not been properly trained.

No charges have been filed against of the officers who shot him.

On Monday, lawyers for the three officers and for Donnelly, Pannell's partner, urged Pannell to exonerate his fellow officers. The officers themselves gave brief statements wishing Pannell a speedy recovery but declined to discuss the shooting in detail.

After Pannell's news conference Ron Reale, president of the Transit Police Benevolent Association, said Pannell suffered severe trauma from the shooting and refuses to accept the truth about what happened.

NYC police trade fire on subway platform

Undercover officer, 2 others are hurt

By Tom Hays
ASSOCIATED PRESS

NEW YORK – The gun battle lasted no more than 15 seconds, just enough time for off-duty Officer Peter DelDebbio to aim his revolver and blast the armed man on a crowded subway platform.

But the moment also was too swift for DelDebbio, himself a one-time victim of a vicious subway crime, to know he was not shooting a fleeing suspect, police said yesterday.

The gunman was undercover Officer Desmond Robinson, 31, who was in critical condition yesterday with four gunshot wounds, including two in the back. One female bystander was treated and released for a gunshot wound caused by the real suspect, police said.

Transit Police officers had been pursuing a man with a sawed-off shotgun amid a swirl of civilians. Saying they still had only a fragmented explanation of what went wrong, police officials refused to assess blame yesterday.

"You had two good cops doing what they're paid to do: Taking action and not running away," Police Commissioner William Bratton said at a news conference called by Mayor Rudolph W. Guiliani.

Based on their interviews with about 30 witnesses, police gave an account of what they believe happened at 7 p.m. in the subway station on Lexington Avenue and 53rd Street:

The trouble started when subway passengers told a uniformed Transit Police sergeant and an officer that they had spotted two armed men, later identified as Shea Davis, 17, and Damal Parham, 16, of Queens.

As the officers arrested Parham, who was armed with a .22-caliber pistol, Davis tried to slip onto a Queens-bound train that had just pulled into the station. Sitting on the train was DelDebbio, 31, a surveillance technician with the New York Police Department.

One of the suspects pulled a sawed-off shotgun out of his pants and tried to dump it onto the tracks before boarding DelDebbio's train. The shotgun instead fell on the platform and discharged, causing a loud explosion and injuring Patricia Coples, 19, as she stood on the platform. Passengers scattered in a panic. A team of plainclothes officers, including Robinson, congregated. The undercover officers were on the lookout for pickpockets, said Albert

'You had two good cops doing what they're paid to do.'

WILLIAM BRATTON
Police Commissioner

O'Leary, a Transit Police spokesman.

"What makes them good is that they dress to blend into the urban landscape," O'Leary said. "It also puts them at greater risk."

DelDebbio, spotting the suspect trying to hide on the train, pulled his off-duty revolver. At one of the car doors, the officer suddenly came face-to-face with what he thought was another suspect armed with a 9mm pistol. It was Robinson.

DelDebbio fired four shots, all of which hit Robinson in the upper torso, including two in the back. During the confusion, a shot fired by a uniformed transit officer ricocheted off the subway car and hit DelDebbio in the arm.

The shooting recalled a 1992 incident in which two uniformed transit officers mistook an undercover transit officer, Derwin Pannell, for a mugger and fired more than 21 rounds at him. Pannel, whose right arm was paralyzed, is using the city for $70 million.

An organization representing black officers charged that the shooters in the Pannel case, who were white, were guilty of assuming Pannel was a mugger because he was black. The same group, the Grand Council of Guardians, raised the same concern in the shooting of Robinson, who also is black.

DelDebbio "is considerably more upset and distraught about this than anyone in this room," Bratton said.

Frequently members of the service have been mistaken for criminals by both citizens and fellow officers. To reduce the possibility of mistaken identity, officers in civilian clothes who is being challenged, must realize that they are **IN FACT, IN CIVILIAN CLOTHES and that they MUST obey the instructions of a challenging officer FORTHWITH. THE CHALLENGING OFFICER DOESN'T KNOW WHO YOU ARE OR WHAT YOU ARE DOING.** It is the responsibility of a civilian-clothed member to IDENTIFY himself. It is essential that all officers be aware that the "Challenge and Reply Situation" is a tense one and requires professional language and conduct to minimize danger.

IDENTIFICATION PROCEDURES:

The **CONFRONTED OFFICER** has the primary responsibility to give proper responses.

The **CHALLENGING OFFICER** has the responsibility to use sound judgement and tactics in approaching the situation:

CHALLENGING OFFICER SHALL:

- **CALL FOR BACKUP WHEN POSSIBLE**
- **UTILIZE AVAILABLE COVER**
- **CHALLENGE FROM BEHIND, WHEN POSSIBLE.** A challenge from the rear and behind cover, allows more time to assess a situation, observe the confronted persons' reaction. It also gives the challenging officer a tactical advantage.

- **AUTHORITATIVELY STATE: "POLICE - DON'T MOVE"** as the initial challenge. **Remember, a challenged police officer, may be taken off guard and inadvertently start to turn around.** The challenged police officer should **use police terminology such as, "I'm a Police Officer".** Both the **CONFRONTED** and **CHALLENGING** officer should **REFRAIN** from using **"street" jargon, slurs or offensive remarks.** The challenging officer should use extreme caution in judging the challenged officer's response to commands.

- **DO NOT BECOME A VICTIM OF THE "SYMBOLIC OPPONENT SYNDROME" (preconceived notion that places suspect into a "criminal" category because of race, ethnicity, nationality, grooming, speech, or mode of dress).**

- **DO NOT** reach any definite conclusions that may lead to irreversible police action, because of a suspect's appearance. **Looks can be deceiving and should not form the basis for action to be taken.**

- **DO NOT** be overly influenced by the style, size or color of a suspects' firearm (plated, stainless steel, semiautomatic, etc.). This person may be an officer of a law enforcement agency which authorizes the use of such weapons. **In fact, it is quite possible that they may be one of our own undercover officers who carry a variety of weapons commensurate with their assignment.**

Officers should attempt to establish a dialogue, but remember that many police agencies are working in New York City at any given time. These officers or government agents may not be able to answer questions concerning various NYCPD forms, radio codes, or procedures that you might use in attempting to establish police identity.

Try to discourage the **CONFRONTED PERSON** from turning around. If this person intends to escape or retaliate in any manner he may able to establish the challenging officer's exact location and the number of backup officers. If more than one officer is involved, **ONLY** one officer should do all the speaking. By not knowing the **CHALLENGING OFFICERS** exact location and the number of backup officers, a **CONFRONTED PERSON** is at a distinct disadvantage. If only one officer speaks, the other(s) can be alert to changing conditions. Officers should be advised that being **VERBALLY DISARMED** is a real possibility. In general, reaction time is decreased when speaking.

OFFICERS ARE WELL ADVISED NOT TO DROP THEIR GUARD OR RELAX THEIR ATTENTION UNTIL THEY ARE 100% SATISFIED! STAY BEHIND COVER! COVER BUYS TIME, PROTECTS OFFICERS, AND HELPS AVOID POSSIBLE TRAGEDY.

OFFICERS SHOULD BE ADVISED THAT IF THEY BECOME THE CONFRONTED PERSON THEY ARE CONSIDERED A SUSPECT BY THE CHALLENGING OFFICER UNTIL PROPERLY IDENTIFIED! CONFRONTED OFFICERS SHOULD ACT ACCORDINGLY; AS THEY WOULD HAVE A SUSPECT ACT IF THE SITUATION WERE REVERSED

IF THE PERSON BEING CHALLENGED CLAIMS TO BE A POLICE OFFICER:

In a firm, but courteous manner, request identification card, shield, or any other credentials that may identify the person challenged. **MAINTAIN CONTROL OF SITUATION.**

CONFRONTED OFFICER SHALL:

- follow instructions **EXACTLY** as stated by challenging officer
- inform the challenging officer of the **EXACT** location of identification before moving.
- produce identification **SLOWLY**, in a **CONTROLLED** manner, **WITHOUT UNNECESSARY MOVEMENT, ONLY WITH PERMISSION OF THE CHALLENGING OFFICER.(P.G. 105-1: I.D. CARD)**

NOTE: CONFRONTED OFFICERS ARE STRONGLY ADMONISHED AGAINST TURNING AROUND TO FACE A CHALLENGING OFFICER WITH A FIREARM IN THEIR HAND

CHALLENGING OFFICER SHALL:
- examine the credentials to insure their validity and assure that the description and photograph fits the individual being challenged.
- return the credentials if satisfied with the identification.
- make an activity log entry.

NOTE: CHALLENGING OFFICER SHOULD CAREFULLY CHECK IDENTIFICATION CARDS. OFFICERS ARE REMINDED THAT IN 1992 A MAJORITY OF NYCPD IDENTIFICATION CARDS EXPIRED AND WERE REPLACED WITH NEW COMPUTER PHOTOGRAPHED BAR CODED CARDS. THESE NEW CARDS INCLUDE TAX #, SHIELD #, DATE OF BIRTH, DEPARTMENT SENIORITY RANKING, AND AN EXPIRATION DATE (12/31/96 AS OF THIS WRITING). THERE ARE PRESENTLY OVER 1,000 NYCPD SHIELDS THAT ARE MISSING, OR UNACCOUNTED FOR, THEREFORE, A SHIELD OFFERED AS A SOLE MEANS OF IDENTIFICATION IS NOT ENOUGH. OFFICERS SHOULD BE MADE AWARE OF THE MULTITUDE OF LAW ENFORCEMENT AGENCIES WORKING IN THE NEW YORK CITY AREA (FBI, DEA, NYSP, PORT AUTHORITY , US CUSTOMS, HOSPITAL POLICE, WATERFRONT COMMISSION POLICE, NYC SHERIFF, DOI, ETC.) THAT MAY NOT BE FAMILIAR WITH NYCPD "CHALLENGE AND REPLY" PROCEDURES USED IN CIVILIAN CLOTHED -VS- UNIFORMED OFFICERS CONFRONTATION SITUATIONS.

If the validity of the credentials is questionable, or either member is dissatisfied with the handling of the incident or the results of the contact, **AND IN ALL OTHER CONFRONTATION SITUATIONS** the patrol supervisor in the precinct of occurrence will be requested to respond **(I.O. 34s.93)**

Whenever **CIVILIAN CLOTHED/OFF-DUTY OFFICERS** are challenged **OR ASKED FOR IDENTIFICATION** by another police officer; **BEFORE REACHING FOR IDENTIFICATION**, they should verbally identify themselves as a police officer in a clear, loud voice, stating **RANK, NAME, DEPARTMENT, AND ASSIGNMENT. OFFICER SHOULD INFORM THE CHALLENGING OFFICER THAT THEY ARE ARMED, AND THE NATURE OF YOUR ACTIONS** (making arrest, undercover, etc.).

Confronted officers should assure that the challenging officer understands who they are before reaching for identification or making any move that may be interpreted as hostile. If challenging officers are unsure of their responsibilities confronted officers may have to ask the challenging officer what to do or if necessary suggest to the officer what should be done. **AGAIN** confronted officers should be sure the challenging officer understands **EXACTLY** who they are before making any move that might be interpreted as hostile. **Confronted officers should be guided by the challenging officer's directions.**

CONFRONTED OFFICERS SHOULD BE REMINDED THAT THEIR ACTIONS MIGHT RESULT IN THE CHALLENGING OFFICER REACTING IN A MANNER THAT IS HIGHLY DANGEROUS OR LETHAL. DO NOT EXHIBIT "AN ATTITUDE". FOR ALL INTENTS AND PURPOSES THE CONFRONTED OFFICER IS AN ARMED PERSON UNKNOWN TO THE CHALLENGING OFFICER(S), UNTIL PROPERLY IDENTIFIED.

CONFRONTED OFFICERS SHOULD NOT:

- Simultaneously reach for identification while informing the challenging officer of their identity.

- Turn and face the challenging officer with a firearm in hand. Although it may be a natural reaction to turn when challenged from behind, officers should resist this urge.

- Move their hands in any manner that can be interpreted as a hostile or menacing movement.

NON-CONFRONTATION SITUATIONS

In those cases where a civilian clothed **ON DUTY,** or an **OFF-DUTY** officer might be stopped by a Uniformed Police Officer in a **NON-CONFRONTATION** situation (car stop, investigation, canvass, DWI checkpoint, etc.) the officer stopped should behave professionally and remember that the uniformed officer is in charge. It is **NOT NECESSARY** to exhibit **"AN ATTITUDE".** Officers are well within their rights to routinely ask for identification. It is recommended that confronted officers adhere to the following procedure:

- **VERBALLY IDENTIFY THEMSELVES AS A POLICE OFFICER.**

- **INFORM THE UNIFORMED OFFICER THAT YOU POSSESS YOUR POLICE IDENTIFICATION AND ITS' EXACT LOCATION.**

- **INFORM THE UNIFORMED OFFICER THAT YOU ARE ARMED AND THAT WITH THE CHALLENGING OFFICERS PERMISSION YOU WILL REACH FOR YOUR IDENTIFICATION.**

CONFRONTED OFFICERS SHOULD BE SURE THE UNIFORMED (CHALLENGING) OFFICER CLEARLY UNDERSTANDS AND ACKNOWLEDGES THEM

Officers should be reminded that there have been over one thousand shields lost or stolen. Therefore, verifying the officers identity via the Identification Card photograph is a **MUST.**

Officers should realize that in an attempt to identify themselves while reaching for their identification, may reveals a firearm, possibly causing the challenging officer to react suddenly. Seeing the firearm, the officer might interpret this to be a hostile/menacing movement.

The sight of a firearm in the hand of an unidentified person will most likely cause a reaction by the challenging officer. This reaction might be the difference between **LIFE** and **DEATH.** Officers should continually, think of themselves as viewed by the challenging officer.

IN UNIFORM:

It has been brought to this units' attention that, on occasion, uniformed police officers have been challenged from behind by other uniformed officers. This most often occurs when an officer, is in an unexpected location, not wearing a uniform hat, in a dimly lighted area, or is difficult to identify as a police officer for some other similar reason.

Uniformed on-duty officers challenged from behind in this type of situation it should conduct themselves as if dressed in civilian clothes. They should not make any sudden movements which may be interpreted as hostile or menacing. The possibility of an adversary challenging a uniformed officer in this manner, while, remotely possible, is highly improbable. An officer in proper, full uniform, is less likely to be challenged in this manner.

All officers are advised that the **HIGHEST RANKING UNIFORMED MEMBER OF THE SERVICE** should be **IN CONTROL** of confrontation situation. Civilian clothed supervisors **MAY NOT** be easily as such by uniformed members of the service not assigned to their unit/command. In fact, civilian clothed members of the service from different units/commands may not even know each other.

Again, it is precisely due to this confusion that the highest ranking uniformed member of the service should be in control.

NOTE: Since 1974 (when the Firearms & Tactics Section implemented the Identification Procedure: **"POLICE, DON'T MOVE"**) there have been no reported incidents of **FATALITIES** due to **MISTAKEN IDENTITY.**

NOTE: SINCE 1985, THERE HAVE BEEN ONLY SIX (6) CASES OF UNIFORMED OFFICERS FIRING UPON OTHER OFFICERS BECAUSE OF MISTAKEN IDENTITY (341/88; 102/89; 47/92; 283/92; 411/93; 193/94) IN THREE (3) OF THESE CASES (341/88; 102/89 AND 283/92), CIVILIAN CLOTHED OFFICERS WERE INJURED. IN ONE (1) CASE (102/92), UNIFORMED OFFICERS FIRED UPON BUT DID NOT HIT ANTICRIME OFFICERS.

TACTICAL CONSIDERATIONS

CONFRONTATION SITUATIONS

Regardless of which nonstandard handgun an officer is carrying, there are several basic tactical considerations which should remembered. The first concern of an officer so armed is one of identification. Since most police officers carry and are trained with a revolver, there is a tendency to view other firearms as being "criminal" weapons. This perception is largely incorrect, as there are thousands of legitimate citizens, as well as federal, state and local law enforcement officers, who walk the streets daily, armed with an assortment of weapon types in various finishes and calibers. Nonetheless, it is imperative for an officer armed with a handgun not readily identified as a police type weapon, to understand the following:

IN THE EVENT AN UNDERCOVER OFFICER IS CHALLENGED BY ANOTHER POLICE OFFICER, HE MUST BE AWARE THAT THE BURDEN OF IDENTIFICATION IS HIS, AND THAT HE MUST AVOID ANY MOVEMENT OR ACTION WHICH MIGHT BE INTERPRETED AS AN ENDANGERMENT TO THE CHALLENGING OFFICER'S SAFETY.

It is clear that an undercover officer dressed in street clothes, perhaps in a manner that would be considered "anti social", will be viewed by a uniformed officer as a potential threat. This is particularly so when the undercover officer is armed with a firearm the challenging officer is not familiar with.

Generally, when an armed undercover officer is challenged by a uniformed officer, the undercover officer should hear;

"P O L I C E, D O N ' T M O V E"

The undercover officer should not move, but in a loud clear voice state; **"I AM A POLICE OFFICER"**. The uniform officer will ask the undercover officer for identification (shield & ID card). At this point the situation becomes sensitive as the undercover officer does not carry identification. It is recommended that the undercover officer state; **"UNDERCOVER P.O."**, and advise the uniform officer that the undercover backup team will be arriving shortly. The undercover officer must remain calm and have a professional attitude. The burden of identification is on the non-uniform member. The potential number and types of confrontations are limitless and defy specific instructions to deal with all the possible permutations which might occur on the street. Common sense, good judgement and an understanding by the undercover officer of his vulnerability are needed to ensure that no needless tragedies occur to members of the service.

OFFICER SURVIVAL

Oleoresin Capsicum

IV

BOSTON POLICE

OFFICER SAFETY ***ALERT***

Prepared by the Boston Police Intelligence Unit
Date:
JUNE 7, 1996

Subject: MOTORCYCLE GANG TACTICS

Source: INTELLIGENCE UNIT

ATTENTION ATTENTION ATTENTION ATTENTION ATTENTION ATTENTION

This officer safety briefing addresses new tactics used by motorcycle gangs at a time when they are currently at war.

Gang members have begun sewing Kevlar ballistic cloth into the linings of their colors.
This intelligence was obtained when Daytona Beach Police officers stopped a member of the "Outlaws" motorcycle gang.
It is important to note at this time that the "Outlaws" are currently involved in a war with the "Hell's Angels".

It has also been learned that the "Hell's Angels" have place a bounty on ANY New York State Trooper and any "Prospector" willing to earn his colors can do so by killing a member of that department.
Be aware that the "Hell's Angels" are actively recruiting new members for the coming feud although it is very likely that they are just looking for cannon fodder and new bikes than increasing permanent members.

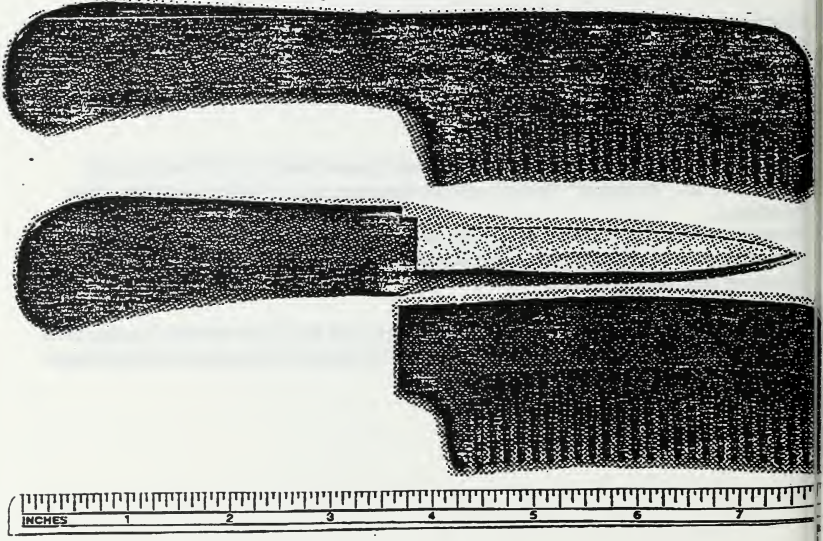
Also, surveillance photos show John Bartolomeo wearing full colors just after the homicide of the "Devil's Disciple" last summer (the vehicle used to kill the Disciple was registered to Bartolomeo who was at the time prospecting for the Angels.)

BOSTON POLICE DEPARTMENT
Bureau of Investigative Services
Intelligence Report

Subject / Title		Date	Page 1 of
OFFICER SAFETY/ KNIFE COMB		04/25/95	1 of 1
Cross Reference/Identifiers	Dissemination Record None ☐ File Only Chain of Command Only ☐ District/Unit Commanders Identified: All Sworn Personnel ☒	Officer Reporting INT-012 CC Reference No.(s) Intelligence File # Status Open ☐ Investigation by: Closed/Inactive ☐	

Evaluation of Source	A☒ Reliable B☐ Usually Reliable C☐ Fairly Reliable D☐ Not Usually Reliable E☐ Unreliable F☐ Reliability Unknow
Evaluation of Info	1☒ Confirmed 2☐ Probably True 3☐ Possibly True 4☐ Doubtfully True 5☐ Improbable 6☐ Truth Cannot Be Judge

Particulars: **Officers should be aware of the concealed knife as shown below. This knife is available by mail order and lists for under $10.00. The length of the double edged blade is 3 3/4".**



USE OF FORCE

Use of Force generally holds the following options:

IX. Lethal Force
- Firearm

VIII. Intermediate Force
- Stun-Gun, Taser
- PR-24 Baton or Other Impact Weapon

VII. Aerosol Chemical Agents: CN & CS
- CN Tear Agent
- CS Irritant

VI. Empty Hand Impact
- Stunning Techniques

V. Decentralization
- Heavy Techniques of Subject Control
- Defensive Tactics
- Above could be with or without PR-24 or Other Impact Weapon

IV. Oleoresin Capsicum Aerosol Sprays
- OC products

III. Passive Control
- Pain Compliance Holds
- Pressure Point Control Tactics
- Escort Techniques
- Light Subject Control
- Above could be with or without PR-24 or Other Impact Weapon

II. Verbal Commands
Verbal Communication
Non-Verbal Communication

I. Officers Presence in Uniform

(Figure 1)

These are a variety of configurations used to illustrate the force options available to officers. A stair-step or ladder configuration is one common method. Instructors utilizing this type of model are cautioned, because officers must understand that they do not need to work through the options from the lowest to the necessary level of force to control to the situation.

Time to can outdated OC spray?

If you've been carrying around the same canister of OC spray (pepper mace) for more than three years, it's probably time to can it and play it safe. An *America Online* report noted a training exercise in which 20 trainees at the Baltimore Police Department were sprayed directly in face with pepper spray that had been turned in by retiring officers. The mace had little or no effect on trainees, despite previous claims that pepper spray had no shelf life. The department plans to recall these products after they've been used for a set period of time, which has yet to be determined.

In a related press release, Gardener Whitcomb, who is retired from the former Luckey Police Products, recommends that officers carrying Luckey OC products for more than three years discard them *immediately.* Extensive testing of these products has revealed that it's possible for microscopic seepage to take place at any OC valve seal—varying greatly with the manufacturer. The propellant used to produce the spray may be able to slowly seep past the seal in minute amounts, so in time, there may be enough propellant loss to affect pressure performance.

Tear gas aerosols always have expiration dates marked on the can, since the chemical compound might deteriorate with age. However, since OC is a natural derivative of cayenne peppers, manufacturers assumed it remained stable within the container. Luckey OC Products did not show deterioration over an extended period, so expiration dates were not considered necessary. Nonetheless, Whitcomb stresses that officers should know their weapons and always keep them up-to-date.

Here's a look at every bullet fired last year by New York City cops, as reported in the police department's 1993 Firearms Discharge Assault Report:

	Shots fired	Hits
At perpetrators	928	173
At dogs	155	111
Accidental discharges	43	17
To protect other officer	18	10
Police officer intoxicated	10	0
Suicide	8	8
Into locker	6	0
At vehicle	5	0
At girlfriend	3	3
Attempting suicide	3	2
Threatening suicide	1	0
At wife	1	1
At beer can	1	0

Best dressed contest under way

Is your department proud of its appearance? If so, you're invited to show off your attire at the upcoming 1995 Best Dressed Police Department Competition, an annual program honoring excellence in uniform appearance and wear.

Now in its 18th year, awards for the contests are presented in five categories: state; county; city with more than 200 officers; municipality with less than 200 officers; and specialized agencies. An independent panel of law enforcement and garment experts will judge entries based on the following: image projection; immediate recognition; reflection of the authority and professionalism of the department; practicality; and policies regarding uniform standards and regular inspections.

The contest, sponsored by the National Association of Uniform Manufacturers & Distributors, is open to all U.S. law enforcement agencies. To be considered for an award, a department must submit a minimum of two 8 x 10 color photographs and a completed entry blank no later than Friday, May 12. Judging will be held shortly thereafter. For information, call (212) 869-0670.

Law Enforcement Day slated May 19

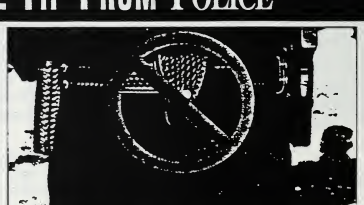
Law enforcement agencies from the Northeast are encouraged to participate in the third annual Law Enforcement Day on Friday, May 19, at the military ocean terminal Bayonne in New Jersey.

The event will feature an array of competitions, awards for best uniforms, equipment and vehicle demonstrations, and specialized unit contests. The event is presented by the International Brotherhood of Police Officers, Local 560, U.S. Department of Defense Police, in conjunction with the U.S. Army Garrison, Bayonne. For more information, call (201) 823-6666.

Officer Survival Tip From Police

Compromising Cuff Comforts

If you wear your handcuff case in the middle of your back, you may want to think twice about this position. If you're seated in your police vehicle for extended periods of times, the handcuff case will be sandwiched between your back and the back of the seat. This can cause considerable discomfort and lead to back injuries after several months or years. There's another problem with this position: If you fall or are knocked on your back, the handcuff case may cause serious injury to your back. It's much safer to wear two handcuff cases—one on your right side and one on the left. In this position, the cuffs are accessible to either hand. Plus, the additional set will come in handy when you're arresting multiple subjects.



The author, Ed Nowicki, is a police training specialist with Milwaukee Area Technical College. He is a part-time officer for the Twin Lakes (Wis.) Police Department, and a technical advisor and frequent contributor to Police. He also edited and compiled the officer survival book, "Total Survival."

PHOTO: THOMAS R. VIOLANTE

Ofc. Henry Butler III, pictured with his 4-year-old daughter, Allison, receives a big kiss from his former partner, Sly.

Doggone retirement!

Earlier this year, Ofc. Henry J. Butler III lost his partner of seven years—an 80-pound German shepherd, Sly, who retired after assisting in more than 1,000 arrests with the East Haven (Conn.) Police Department.

Born on Jan. 25, 1986, in Germany, Sly has put 15 bites on perpetrators and reportedly saved his partner's life one time when Butler was attacked by a suspect. Sly is now the Butler family pet, while Neko, a 16-month-old shepherd, is training to take his place.

—Thomas R. Violante

Bill of Rights Act

The Law Enforcement Officers' Bill of Rights Act of 1995 was recently introduced in both houses of Congress. The bill, S.923 and H.R.878, respectively, would offer the following procedural protections for officers subjected to investigation or interrogation in regard to disciplinary matters (other than of a criminal nature):

- Questioning must be conducted at reasonable times; for a reasonable amount of time; and held at the office of those conducting the investigation (or where the officer normally reports for duty), unless the officer agrees otherwise.
- Officers must not be threatened, harassed or rewarded (except an offer of immunity from prosecution) to induce the answering of a question.
- Officers shall be entitled to have counsel or any other individual of their choice to represent them at the interrogation.
- Officers shall be advised of the results of the investigation, and also be entitled to a hearing and to hearing transcripts and documents.
- No adverse personnel action shall be taken against the officer unless he/she has been found to have violated an administrative rule, following a due process hearing.
- An officer shall not have any adverse material placed in his/her file without an opportunity to review and comment in writing.
- Except when on duty or acting in an official capacity, no officer shall be prohibited from engaging in political activity or be denied the right to refrain from engaging in such activity.

The National Association of Police Organizations, the Fraternal Order of Police and the International Brotherhood of Police Officers drafted the bill's language. For details, call (202) 842-4420.

Cops offer cash for taggers

Many cities and towns are increasingly plagued with graffiti—and Phoenix is no exception. Last year the city spent $1.2 million to deal with graffiti on city buses alone.

To help crack down on "taggers" caught in the act, the city has launched a pilot program in its northwest Cactus Park Precinct. Under the plan, citizens can receive rewards of up to $250 for nailing the vandals. The money comes from a special grant designed to educate children about graffiti.

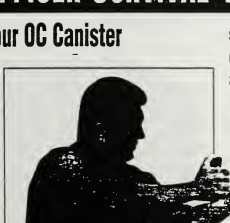
Councilwoman Thelda Williams believes the effort will be successful. She cites two bridges that have historically been covered with graffiti but have remained clean since word of the reward program spread. Police administrators also see potential in the new program. They plan to ask the Phoenix City Council for funds to take the reward program citywide. This could mean hiring as many as 10 people, although support may be difficult given an estimated annual price tag of about $500,000.

The reward money itself would come entirely from private donations, mostly from businesses. Barry Starr of Phoenix Community Alliance, a nonprofit agency in charge of the pilot program, said his group has already raised more than $3,000. A telephone hotline will also be established, and cash rewards will be given for tips that lead to the arrest or conviction of taggers.

—Cole Morris

Officer Survival Tip From Police

Safeguarding Your OC Canister



Many officers tend to extend their OC canisters directly in front of them while spraying suspects. But this can be risky, since a suspect can easily grab the OC and use it against the officer. Therefore, an officer should hold the spray in his/her dominant hand—commonly referred to as the strong (handgun-holding) hand. The weak hand should be extended beyond the strong hand, which makes it more difficult for the subject to grab the OC canister. The weak hand can also be used for defensive action.

In a situation where an officer must fully extend the canister, the OC canister should be held in the weak hand. An alternative weapon can be held in the strong hand for possible follow-up use if the OC is ineffective. The use of this follow-up weapon, however, must be justified and reasonable under the circumstances.

The author, Ed Nowicki, is a police training specialist with Milwaukee Area Technical College and a part-time officer for a midwestern police department. He also edited and compiled the book, "Total Survival," and hosts the talk radio show, "American Crime Line with Ed Nowicki."

way to deal with it is to have a member of the supervision and/or command staff make presentations to the rest of the agency about the actual facts of the incident. Preferably, the person doing the presentations was involved in the incident in some manner and was present at the group tactical debriefing to make sure that he or she has all the facts straight before telling others. Incident clarification can be an effective way to minimize or end the inaccurate rumors and destructive second guessing that often follows in the wake of an incident. It also allows the noninvolved personnel an opportunity to ask questions and perhaps air their own concerns or feelings about the incident. This is helpful after a particularly traumatic incident which may emotionally impact even personnel who were not at the scene. It also gives the command staff an opportunity to gauge the reactions of their personnel and address their concerns. As with a tactical debriefing, there may be political and legal considerations that will affect the timing of an incident clarification and whether or not it is done at all.

These debriefings are not automatically one-time events. Depending on the circumstances, there may be a need or desire for some of the debriefings to occur more than once if the participants are still struggling to gain closure. Debriefings can be helpful even months or years after an event.

About the Author: ***Dr. Alexis Artwohl is a police psychologist and law enforcement trainer practicing in Portland, Oregon. She has conducted numerous debriefings after shootings and other traumatic events with police officers and family members. She provides training to multiple law enforcement agencies.***

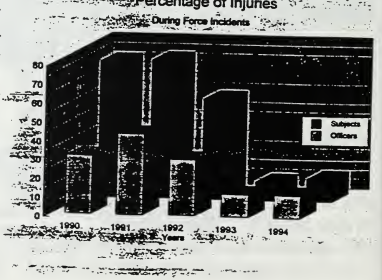
Oleoresin Capsicum Spray:
A Progress Report

by Lt. Russell J. Gauvin

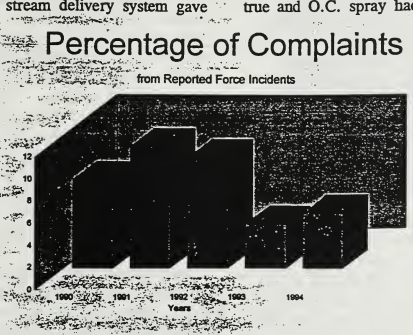
In 1991, the Portland Police Department began to look at oleoresin capsicum spray (O.C. spray) as a possible non-lethal force alternative for its officers. By the fall of 1992, after extensive research, comparative tests, and a hands-on assessment of the various products available, the decision was made to issue O.C. spray to Portland Police officers. The decision to issue O.C. spray was not made lightly by this department. The Portland Police Department had not issued any chemical agents for use by patrol officers since an officer was partially blinded by a tear gas product almost thirty years ago.

They decided to look into O.C. spray in an effort to reduce the increasing number of officer and citizen injuries during forceful situations, and to reduce the rising number of excessive force complaints. The department wanted an effective, less graphic, and less harmful force option that could be used, if possible, before the use of impact weapons. The department developed a O.C. spray user lesson plan, conducted mandatory training for all officers, and began to issue O.C. spray to those officers who successfully completed the training.

The Portland Police Department decided to go with a product that is 100% organic, non-toxic, biodegradable, non-mutagenic, non-carcinogenic



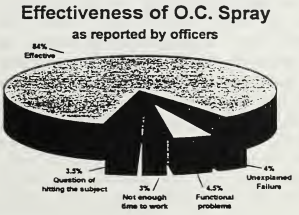
and non-flammable. The department felt that an environmentally safe product was a definite plus. The department chose to go with an O.C. spray canister that delivers the product in a narrow stream (as opposed to in a mist/fog.) The department felt the stream delivery system gave better target selection, better effective distance, and minimized secondary contamination better than a mist delivery system. However, there are many O.C. spray products on the market from which an agency can choose, and the purpose of this article is not to endorse or recommend any particular product. This article is intended to give those agencies that are considering issuing O.C. spray some idea of what to expect for results concerning officer and subject injuries, force complaints, product acceptance, and product effectiveness.

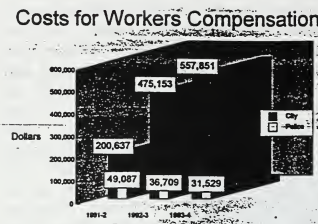


Prior to tracking the department's experience with O.C. spray, they conducted an in-depth analysis of 388 reported use of force and citizen complaint incidents covering the three year period (1990-1992) just before the issuance of O.C. spray. The department used the 1990-92 study results as a basis for comparison with the results from the department's ongoing assessment of O.C. spray.

In the 1990-92 study, it was found that subjects in reported force incidents were injured in 69% of the incidents, and officers were injured in 31% of the incidents. Since O.C. spray's inception in Portland two years ago, there have been 226 incidents where officers used O.C. spray. There have been only twenty-six subjects (12%) and twenty-eight officers (12%) injured during these force incidents. Interestingly, of those fifty-four injured subjects and officers, thirty-three (61%) were injured before the officer's decision to use O.C. spray, six subjects injured themselves by thrashing around after being restrained, and seven were injured by officers when the O.C. spray did not sufficiently incapacitate the subject and the officers had to strike with their fists or impact tools. Only four officers have been injured after O.C. spray was utilized. If the 1990-92 study percentages held true and O.C. spray had not been available, the 226 O.C. spray incidents to date would have resulted in an additional 130 subject injuries and an additional forty-two officer injuries. This represents a decrease in subject injuries of 83% and a decrease in officer injuries of 61% when O.C. spray is used and a decrease in subject injuries of 62% and a decrease in officer injuries of 49% overall.

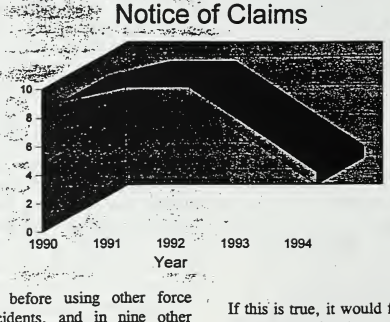
The 1990-92 study showed that 9% of force incidents resulted in subjects of the force filing excessive force complaints. Based on the study, the 226 O.C. spray force incidents would likely have produced twenty excessive force complaints from subjects of the force. However, only seven (3%) subjects from O.C. spray incidents have filed excessive force complaints to date, and five of those excessive force complaints focused on other force that the officer used prior to the use of the spray. One officer has been disciplined for inappropriate use of O.C. spray. Nine (11%) excessive force complaints were filed from the eighty-eight reported force incidents that did not involve O.C. spray. The use of O.C. spray appears to be responsible for an overall decrease





of 43% in the number of excessive force complaints resulting from reported force incidents.

The department's analysis shows that O.C. spray is effective as an incapacitating agent. Officers reported its effectiveness in 85% of the incidents (191 of the 226 uses.) Of the thirty-five incidents where officers felt the spray was not effective, officers reported eleven instances of functional problems with the O.C. canisters (an officer broke the trigger of one canister, three other canisters failed to spray because of an unexplained loss of pressure, and seven canisters sprayed a mist instead of a stream of liquid as designed.) In other instances the officers felt the spray was not effective, officers did/could not give enough time for the spray to take effect before using other force options in seven incidents, and in nine other incidents there was some question whether the spray sufficiently hit the subject. In one incident O.C. spray was not effective when used on a person who was out of control as a result of a medical problem. In the remaining seven incidents, the officer accurately sprayed the subject and allowed time for the spray to work, but the spray did not produce the desired incapacitating effect. (One of the six had a partial effect, causing the man to trip and fall, but did not incapacitate.) Those seven unexplained failure incidents illustrate a 97% effective rate (3% ineffective rate), which is consistent with most manufacturers' claims of a 95% effective rate.



Of the 226 subjects involved in O.C. spray incidents, 197 (87%) were intoxicated - 168 (74%) were intoxicated on alcohol, thirty (13%) were intoxicated on a combination of alcohol and drugs, or an unknown substance, and three (1%) were intoxicated on drugs. Interestingly, of the thirty-five incidents in which officers reported that the spray was ineffective, eleven of those incidents involved persons in the group of thirty people who were intoxicated on something other than, or in addition to, alcohol. In the seven unexplained failure incidents, three (43%) of the subjects involved were reported as being intoxicated on drugs or drug combination.

Since going to O.C. spray, five subjects have been sprayed on more than one occasion (two each). In three (60%) of these five incidents, the sprayed subject (who had been sprayed and incapacitated by police during a previous incident) remained combative and was not incapacitated during the second incident. While the numbers are small, it can be argued that a determined, aggressive, subject (all three subjects had numerous previous violent arrests) who has been sprayed previously, can partially overcome or partially compensate for the O.C. spray effects. If this is true, it would follow that an officer, who has been previously exposed to O.C. spray effects, could be more effective in his own defense if sprayed during an altercation at a later time.

In the 226 incidents where the spray effectively controlled the person, the average number of O.C. bursts needed was 1.2 (one burst in 182 incidents, two bursts in thirty-nine). There were only six incidents where the subject received more than two bursts (all received three) and in

five of the six cases the spray was still reported as ineffective. It appears that if two bursts are delivered appropriately, and are not effective, additional bursts will probably not make the product more effective. The average distance between the subject and the officer using the O.C. spray was 4.2 feet, but officers reported it to be effective from a distance of ten feet. There were only twelve reported instances where the spray struck unintended targets (eleven fellow officers and one bystander.) Two officers were contaminated by O.C. spray transfer from a sprayed subject's hands. Several spray incidents occurred in sub-zero temperatures and it appears, at least initially, that cold temperatures do not hamper the delivery of the spray or reduce its effectiveness.

Portland Police officers have welcomed and accepted O.C. spray as a useful force option. This is supported by the fact that O.C. spray was not used in only eighty-eight (28%) of the 314 force incidents Portland reported since the issuance of O.C. spray. In those eighty-eight incidents, fifty-seven (65%) of the subjects were injured and twenty of the officers (23%) were injured. In addition, nine (10%) of the subjects in those incidents filed complaints of excessive force.

While a definitive correlation cannot be made, department workers' compensation claims decreased (both in number and in severity) since they adopted O.C. spray. An independent study by Sedgwick James of Northern New England showed that the police department was the only department in Portland municipal government to show decreases in both areas for the two fiscal year periods of 1992-93 and 1993-94. While City Government showed an increase in the number of workers' compensation claims by 6% during the two fiscal year periods, the police department's number of claims decreased 16%. Severity of the injuries was measured by resultant cost of the injuries to the city. The city as a whole showed an increase in injury costs of 178% over the two fiscal year periods, while the police department showed a decrease in injury costs of 36%.

The Department is also currently studying the notice of claims (first step of a lawsuit) filed against the department. During the three year period of 1990-1992, the department averaged nine notices of claim a year alleging excessive force was used during an arrest. To date, the city has received only six notices of claim against the police department for excessive force allegations from 1993 incidents and three notices of claim against the police department for excessive force allegations from 1994 incidents. The numbers are small, and any one incident could significantly effect any percentage increase or decrease. However, when compared to the same period prior to issuance of the spray, the nine total claims to date for 1993 and 1994 represent a 50% decrease in excessive force claims received.

While O. C. spray is still a relatively new force option, the results the department is seeing in Portland are encouraging. The department's experience to date shows O.C. spray's usefulness and acceptance. O.C. Spray is not a solution to all of law enforcement's use of force problems. However, if the spray is used by properly trained officers, and is considered simply as an additional tool (as another force option), then it can be a valuable asset to any department. The significant decreases in officer injuries, subject injuries, excessive force complaints, notices of claim, and workers compensation claims that the department has seen since going to O.C. spray are an impressive testament to the value of O.C. spray as a force option. We encourage those agencies that have not considered O.C. spray to take a serious look.

About the Author: Russell J. Gauvin is a Lieutenant in the Internal Affairs Unit of the Portland Police Department.

Reminder:
Board of Directors Election
Deadline
September 15, 1995

Where Chemical Weapons (Aerosol Subject Restraint) Fit in the Use of Force Continuum

by Peter A. Danas

Aerosol Subject Restraint (ASR) weapons have gained increased acceptance and popularity among law enforcement officers and police agencies as a safe and effective method of incapacitating violent criminals or threatening subjects. As a result of this popularity, aerosol products are being scrutinized by the courts, law enforcement, and advocacy groups in an effort to determine the efficacy of these products as non-lethal compliance devices. Additionally, these groups have begun pondering the place of ASR products in a comprehensive policing structure, especially in the Use of Force Continuum.

The advent of chemical agents has offered police and the general public the opportunity to vigorously defend themselves in a non-aggressive, non-lethal, and relatively non-litigious form. Various law enforcement agencies nationwide have experienced great success with ASR materials, often documenting these successes and offering the results to other departments and organizations for their review. This increased law enforcement usage has naturally emboldened the general public in its pursuit for sensible defensive devices. However, while the public's usage of chemicals continues to grow, police have the additional responsibility of first determining their applicability.

Evolution of Chemical Products

Chemical warfare was first introduced by the Ancient Greeks as a method to subdue enemy troops by gaseous assault. The Greeks catapulted huge, flaming balls of tar (actually pitch and sulfur) at enemy warships. These burning tar balls emitted a noxious chemical which would temporarily disable even the mightiest of warriors. While information exists about the earliest usages, most documentation comes from the wars of the twentieth century. Mustard gas was used to subdue troops in World War I and the Axis partners attempted to use chemical agents against the Allies in World War II. The most wide-spread use of chemical agents in United States history occurred during the Vietnam War in Southeast Asia, where they were used for defoliation purposes and to deny the enemy a military advantage. At the same time, in the US, chemicals were used to quell riots in Watts and Detroit. This was the chemical agent CS.

During that time frame, mace, a form of the CN chemical agent was introduced to the marketplace. CS military agent was still considered more effective. These chemicals were popular until a new agent Capsicum, whose derivative is today's Oleoresin Capsicum (OC), was produced as a dog repellent and later adapted for use against humans. Originally, chemical products were produced only for law enforcement. However, as the effectiveness of these agents became more well-known, manufacturers began to offer them to the general public as potent defensive tools for criminal deterrence.

Chemical Sprays Introduced to Law Enforcement

The early seventies saw the advent of chemical weapons as alternative weaponry for law enforcement. This product was, for the most part, a CN based agent developed and manufactured originally through Smith &

Wesson. CN was produced under a variety of trade names, however the Mace brand (Smith & Wesson) was by far the most popular, so much so that Mace has become a generic term for all ASR agents. CN is a man-made product which, at the time, proved somewhat effective but was viewed as an inconsistent defensive agent. Law enforcement found CN to be ineffective against the more dangerous segments of society such as drug abusers, drunks, and psychotics. Also, the delivery system of these products was poor. Most agents relied on a pressurized delivery system to force the chemical from the can. Unfortunately, these cans soon lost pressure, requiring officers to vigorously shake the can to re-energize the delivery system. While the CN lacrinator, which attacks both skin and mucous membranes, would occasionally yield the desired effects, the varied nature of police usage demonstrated that CN was not potent enough. Police then began to move away from chemical agents as a serious restraint against offenders, adopting instead the new generation of impact weapons such as the PR24 Police Baton.

For a time, impact weapons became the choice of police as a convincing and vigorous means of persuasion against unsavory characters. Soon however, law enforcement was ridiculed for its seemingly barbaric use of the baton, as television brought videotaped confrontations to its nightly newscasts. Images of police beating "defenseless, innocent victims" became a public relations nightmare for senior law enforcement officials. Public outcry forced these officials to re-evaluate their policies concerning the application of force to restrain individuals. Additionally, the increased incidence of police injury, coupled with the constant threat of contacting deadly communicable diseases such as AIDS, forced departments to re-evaluate the concept of physical combat with subjects.

Introduction of CS, OC and blends

After the circus surrounding the videotape of the Rodney King beating in Los Angeles, police officials began to seriously reconsider their departmental policy on the use of force. In Cincinnati, law enforcement had been compiling statistics on their use of chemical agents, with positive results. Similarly, in Kansas City, statistics were compiled by the Kansas City Police showing similar, impressive results. For each city, statistics showed that in literally thousands of applications, the new chemical agents now available proved enormously effective. These agents are OC and CS based products.

OC or Oleoresin Capsicum is a derivative of hot red cayenne peppers and is the most recent of the popular defensive sprays. CS, as discussed earlier, is a man-made irritant. It is a more effective irritant than CN, attacking tear ducts, mucous membranes and skin. CS contains orthochloroben-zalmalononitrile, and is manufactured under various trade names. It is stronger than CN, which contains alpha-chloroacetophenone. CS has not been proven deadly to humans, but CN has in a handful of cases. Both are man-made chemicals, a fact which has driven police to avoid these products, in fear of possible litigation. OC is not an irritant, but an inflammatory agent. It is most effective when in contact with mucous membranes (eyes, nose, throat). This contact will cause immediate dilation of the capillaries of the eyes and instant inflammation of the breathing tube tissues. This results in involuntary closing of the eyes and extreme difficulty in breathing. Since CS and CN attack tear glands, their effect on drunks and drug addicts, whose tear glands are impaired by abuse of drugs and alcohol, is minimal. OC has proven very effective against these persons.

Manufacturers of OC and CS products now offer intensive training programs to acclimate law enforcement to these agents. These programs, which offer training and awareness of legal issues as well as appropriate methods of carry and deployment, have given police a sense of comfort with chemicals. Additionally, studies such as those in Cincinnati and Kansas City have offered police verifiable information to assist in responding to any challenge to their choice of agents.

Use of Force - Where Chemicals Fit

Since chemicals are playing an important role in today's law enforcement armories, efforts have

been made to determine where these agents should fall in the Use of Force Continuum. Having recognized the differences in the three major agents, OC, CS, and CN, most agencies have resolved to place OC, which has proven non-lethal, in a separate category from CS and CN. Many organizations have placed the use of OC much nearer the beginning of the use of force model, fourth in line behind officer presence, verbal commands and passive restraints (soft hand). CS and CN however, because of their potentially lethal effects, share a place much further along the continuum, beyond both decentralization (PR24 chops, jabs) and hard hand impact (stunning tactics). The placement of these products would then seem to be proper, at first glance.

Most police departments have made the decision to deploy only OC devices. The previous models featuring Cincinnati and Kansas City have also revealed virtually zero litigation associated with the use of OC sprays, therefore the choice of OC appears to be the appropriate one. (It should be noted that a blend of OC and CS is also available. Police have opted to avoid it, although it is popular among the general public.) There has been one official death attributed to OC (July 1993), but this was in part attributed to a pre-existing bronchial condition on the part of the deceased. Overwhelmingly, statistics have proven OC to be safe.

The case to move OC to a more primary position in the continuum is strong. Many feel that the dangers inherent hand-to-hand combat, both police injury and susceptibility to a variety of illnesses, have led officers to eschew any physical contact. Even the FBI has listed OC as a primary tool for controlling suspects. The FBI views a "non-person" as any coherent subject who fails to respond to verbal commands. This "non-person" is then subdued with OC.

Some would argue that the use of any invasive chemical, whether natural or man-made, could result in a serious allergic reaction, or death, of an individual. They argue that placement of these weapons early in the Use of Force Continuum may be irresponsible. Their concerns are legitimate. The person sprayed with OC, however, is in virtually no danger of permanent injury. Incidence of officer injury is dramatically reduced. Studies like Cincinnati and Kansas City have revealed that the use of chemical agents have also contributed to fewer incidents where lethal force is required. These facts make a strong case for the inclusion of chemical (OC) agents to an primary position in the Use of Force Continuum.

About the Author: ***Peter A. Danas*** *is currently a constable for the Commonwealth of Massachusetts and is an instructor for Instructional Shooting Inc., out of Lowell. He is an active member of ASLET*

PAVNET Unveiled by NIJ

---Continued from page 1---

PAVNET is available over Internet by either FTP/Telnet or through a Gopher service. Those wishing to use FTP/Telnet to connect to this service are advised to contact John Gladstone, PAVNET Systems Manager, and request the publication *PAVNET Online User's Guide.* Mr. Gladstone can be reached at (301)504-5462 or at Jgladstone@nalusda.gov.

Gopher access can be achieved in a couple of ways, depending on the type of Gopher system you have available. Direct Gopher access would be through *pavnet.esusda.gov.* If your Gopher access is through a menu driven system, you would enter your Home Gopher Server. From that menu, you would select *Other Gopher and Information Servers.* From the menu that follows, you would then select *Search titles in Gopherspace using veronica/.* Select next *Find ONLY DIRECTORIES by Title Word(s) (via NYSERNet)* <?>. After making this selection, you will be prompted for the desired Gopher. Enter the word *PAVNET* at the prompt and press <enter>. You will then be in the

FOREWORD

U.S Department Of Justice
Federal Bureau of Investigation

Chemical Agent Research
Oleoresin Capsicum

During the summer of 1987, the Firearms Training Unit (FTU) of the FBI Academy, Quantico, Virginia, became interested in the chemical agent oleoresin Capsicum (OC) as a supplement to Chloroacetaphenone (CN) and Orthochlorobenzalmalononitrile (CS), chemical agents that are presently unwed by the FBI. The following information is a compilation of background information and research conducted by the FTU.

MEDICAL RESEARCH

In 1987, the U. S. Army Chemical Research and Development Center (CRDEC), Aberdeen Proving Ground, Maryland, made available to the. FTU open literature medical research documents regarding the experimentation with capsicum. These documents revealed the reaction of laboratory animals who were subjected to Capsicum by gastrointestinal doses, subcutaneous injections, liquid droplets to the eyes, and skin patch tests. CRDEC was not able to provide the FTU with any medical research whereby laboratory animals were placed in an enclosed area and were exposed to OC. that was disseminated into the atmosphere in an aerosol form, Unlike the available medical research regarding CN and CS, Median Incapacitating Dosage (ICt5O), or Median Lethal Dosage (LCt5O), of OC was not available Unlike the available medical research regarding CN and CS, CRDEC was not able to provide the FTU with any available short or long term mutagenic or carcinogenic medical research regarding exposure of laboratory animals to OC,

The FTU contacted two Research Chemists who are assigned to the FBI Forensic Science Research and Training Center and an Analytical Chemist who is a member of the Human Investigations Committee that meets at the FBI Academy. These chemists advised that since OC is derived from a naturally occurring plant, cayenne pepper, which is used in foodstuffs and pharmaceutical products, its usage would fall outside of many governmental regulatory guidelines that would be applicable to synthetic man-made chemical agents, such as CN and CS. They also advised that they could foresee no long term health risks related to using OC as a chemical agent.

MANUFACTURER CONTACTS

The FTU contacted two of the largest manufacturers of OC aerosol units in the U.S. and they advised that since 1977, they have sold over 505,000 aerosol grenades and Individual Protective Devices (IPDS) that contain OC.

LEGAL RESEARCH

The FTU monitors lawsuits that have been filed against law enforcement officers or agencies resulting from the use of chemical agents. The FTU is unaware of any lawsuits resulting from the use of OC

HUMAN EXPERIMENTATION

From July 1987 to May 1989, 59 individuals have been sprayed directly in the face with IPDs containing solutions ranging from 1% to a 5% of OC. The observed physical effects of these individuals were more severe when they were exposed to a larger percent solution of OC and when they were sprayed with a continuous three-second burst or three one- second bursts as opposed to a single one-second or two-second burst. The observed physical effects of these individuals ranged from severe blepharospasm (twitching or spasmodic contraction) of the eyes to involuntary closing of the eyes; respiratory inflammation ranged from coughing and shortness of breath to gasping for breath with a gagging sensation in the throat;. exposed skin inflammation ranged from a burning sensation to an acute burning sensation and redness of the skin. Four individuals experienced a brief period of nausea and six individuals experienced the physical characteristics of loss of upper body motor skills. .Personal decontamination of these 59 individuals consisted of flushing the eyes and face with cool water. Facial burning persisted in 16 of these individuals and soap and water was used for further decontamination Ice was used to relieve the persistent burning in 5 of the mentioned 16 individuals. Depending on the complexion of the individual and the concentration of aerosol sprayed on the face, discoloration would range from slight skin discoloration to bright redness of the skin. This skin discoloration would disappear within two minutes to forty minutes after decontamination. When redness of the skin was no longer apparent there was never any further irritation of the skin nor did any blisters or rashes develop on

the skin. . The mucous membranes and upper respiratory systems in all 59 individuals were inflamed; however, respiratory functions appeared to return to normal within two minutes after each test. Most of the 59 individuals breathed through their mouths of breathed shallowly through their nose for approximately ten Minutes after being sprayed. After ten minutes, these individuals could breathe deeply through their nose demonstrating relief from the inflammation of the mucous Membranes. Visual acuity returned within two to five minutes after decontamination. The eyes appeared bloodshot for 10 to 15 minutes after contact with the aerosol; however, once visual acuity was established, there were no further vision problems. Although medical attention was readily available in all of-the IPD tests, nobody required any further medical attention other than the mentioned personal decontamination. From November, 1987 to July, 1989, a large number of individuals were placed inside various sized enclosed areas. They were exposed to solutions of OC ranging from l% to 10% which were disseminated from one or more aerosol grenades. The observed physical effects of these Individuals were more severe when they were exposed to a greater percent solution of OC and when they remained inside the enclosed contaminated area for a longer period of time. The duration of exposure lasted from 10 to 20 seconds in most cases to 45 seconds in relatively few cases.

The observed physical effects of the exposed individuals (a total of 899 were tested) ranged from stinging and lacrimation of the eyes to severe blepharospasm; respiratory inflammation ranged from coughing and shortness of breath to deep coughing, retching, and gasping for breath, exposed skin inflammation ranged from slight burning to a mild burning sensation and redness of the exposed skin. Depending upon the deepness of breathing and the amount of exposure time, different degrees of temporary paralysis of the larynx were observed. Some individuals could talk but only in short phrases while other individuals could only emit a gasping noise When asked to speak,

Personal decontamination for these 899 individuals consisted of removal from the enclosed environment to fresh air. Approximately 500 individuals flushed their face with cool water and approximately 200 of these 500 individuals required soap and water to expedite their personal decontamination. Medical attention was also readily available for these individuals but nothing more than fresh air, soap and water was required.

QUESTIONNAIRE RESULTS

The FTU furnished questionnaires to 39 police agencies and 3 correctional institutions that are presently using aerosols containing OCR. The table below depicts the responses provided by these agencies regarding the number of times OC was used between 1987 and 1988:

Number of Times Used	Number of Agencies
1 - 5	27
6 - 15	8
16 - 25	1
26 - 40	3
41+	3

None of these agencies reported any medical problems encountered by subjects being subdued and or arrested, and no medical problems were encountered by the law enforcement officers delivering the OC aerosol. Some agencies wrote self-explanatory comments regarding their experiences using OC while other agencies were telephonically interviewed. Following are some highlights from these statements and interviews. one agency advised that they frequently use OC and had positive results with one exception, which was when a frequent drug user was holding 3 officers at bay with the end of a pitchfork (the handle was missing). The subject was sprayed with OC but showed none of the mentioned physical effects. Four agencies advised they have successfully used OC against an individual under the influence of narcotics. one agency (26-40 times used) and two agencies (4 1 + times used) advised that they have successfully used OC against individuals under the influence of narcotics on numerous occasions. one agency reported they frequently use OC to break up fights on the street. Two agencies stated they have successfully used OC to subdue mentally unbalanced individuals. Another agency advised an unassisted uniformed officer successfully used an aerosol grenade containing OC to break up a fight a union hall. One agency advised that an individual under the influence of alcohol was successfully subdued by using OC and three agencies stated that they have successfully used OC on numerous occasions to subdue individuals under the influence of alcohol Six agencies reported that they have successfully used OC against individuals who are extremely excited or agitated. OC was used once to totally disable a very large biker pursuant to his arrest. one agency reported that a very aggressive poacher who was 6' 6" tall and weighed 250 pounds was successfully arrested and transported by an unassisted officer. Three agencies advised that they have successfully used OC on numerous occasions to subdue individuals who are highly excited or agitated. Two agencies reported OC is frequently used to subdue inmates who are violent and uncontrollable. Ten agencies advised that they have successfully used OC aerosols against aggressive or attacking dogs. one agency stated that

an OC aerosol grenade was used to break up a pack of wild dogs. Two animal control agencies advised that OC has been successfully used numerous times to subdue aggressive dogs. One agency stated that OC has been used 5 times to subdue guard dogs while the dog's owner was being arrested.

DECONTAMINATION

Aerosols containing OC are not persistent, therefore personal and area decontamination are relatively simple. Personal decontamination has been previously mentioned and consists of putting the subject in fresh air and providing soap and water if necessary. If a subject has been in an environment contaminated by CC, removal into fresh air for a short period of time should be sufficient to remove the OC particles from the subject's clothing. The subject can then be transported without the transporting officers being effected by the OC, If a subject is sprayed directly in the face with an aerosol from a unit containing OC and the subject's clothing is discolored as a result of coming into contact with a hi concentration of OC, the subject should be removed to a fresh air environment until the clothing is dry. The subject will then be ready to transport without the transporting officers being effected by the OC . Normal machine washing will remove the discoloration caused by OC and other uncontaminated clothing can be washed with OC contaminated clothing without fear of contaminating the entire load of laundry-. Area decontamination consists of ventilating the enclosed area by opening doors or windows. Cross ventilation was unnecessary with large fans as would be required with CS or CN, and within one half hour from the initiation of area decontamination there were no traces of OC contamination

None of the 39 police agencies or the 3 correctional institutions that finished. the mentioned Questionnaire results mentioned personal or area decontamination problems while using OC.

OLEORESIN CAPSICUM SPRAY

A Progress Report

By Russell J. Gauvin

The Portland, ME, Police Department first considered oleoresin capsicum spray (OC) as a possible non-lethal force alternative for its officers in 1991. By the fall of 1992, after extensive research, comparative tests, and a hands-on assessment of the various products available, the department authorized the use of OC spray by Portland Police officers.

The decision to issue OC spray was not made lightly. The Portland Police Department (PPD) had not issued any chemical agents for use by patrol officers since an officer was partially blinded by a tear gas product almost 30 years ago.

The department looked into OC spray as a means of reducing the increasing number of officer and citizen injuries during forceful situations, and to reduce the rising number of excessive force complaints. An effective and less harmful alternative was needed that could be used before the use of impact weapons. The department developed an OC user lesson plan, conducted mandatory training for all officers, and issued OC spray to officers who successfully completed the training.

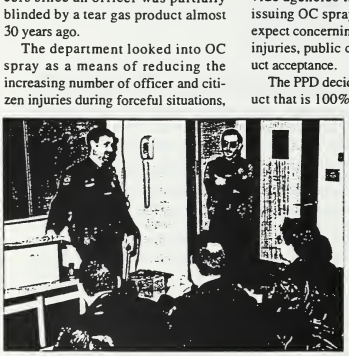
There are many OC products on the market and this article is not intended to endorse any particular one. We believe the PPD experience will provide agencies that are considering issuing OC spray, an idea of what to expect concerning officer and subject injuries, public complaints and product acceptance.

The PPD decided to go with a product that is 100% organic, non-toxic, biodegradable, non-mutagenic, non-carcinogenic and non-flammable. An environmentally safe product is a definite plus.

Also selected was an OC canister that delivers the product in a narrow stream as opposed to a mist/fog. Our evaluation was that the stream delivery system gave better target selection, better effective distance, and minimized secondary contamination better than a mist delivery system.

Prior to tracking actual experiences with OC, an analysis was made of 388 reported use of force and citizen complaint incidents covering the three year period (1990-1992) prior to the issuance of OC. These study results are used as a basis for comparison in our ongoing assessment of OC.

Continued on page 68



Knowing and understanding the department's policy regarding the use of OC spray is important before using this tool in a street situation.

irrelevant considering product use, they are very necessary.

With only a few states regulating these products, the responsibility of choosing a safe, yet effective product, rests with the purchaser. Therefore, it is imperative that police agencies evaluate the ingredients used in pepper spray products to minimize their liability.

One should also be concerned with the delivery system. Are the contents harmful? Is the product flammable? Does it spray in a mist, fog or stream? What claims does the product make? Is there information on how to use the product or first aid information? All of the answers to these questions should be readily available, or easy to obtain. If not, consider another product. L&O

David K. DuBay is the director of research for Defense Technology Corporation of America in Caspar, WY.

OC Spray Progress Report continued from page 64

In the 1990-92 study, subjects in reported force incidents were injured in 69% of the incidents; and officers were injured in 31% of the incidents. Since OC was authorized by PPD, officers have used OC in 226 incidents. Only 26 subjects (12%) and 28 officers (12%) were injured during these force incidents.

Of those 54 injured subjects and officers, 33 (61%) were injured before the officer's decision to use OC. Six subjects injured themselves by thrashing around after being restrained, and seven were injured by officers when the OC did not sufficiently incapacitate the subject and the officers had to strike with their fists or impact tools. Only four officers have been injured since OC was permitted.

If the 1990-92 study percentages held true and OC had not been available, the 226 OC incidents would have resulted in an additional 130 subject injuries and 42 officer injuries. This represents a decrease in subject injuries of 83% and a decrease in officer injuries of 61% when OC is used, and a decrease in subject injuries of 62% and a decrease in officer injuries of 49% overall.

The study showed that 9% of force incidents resulted in subjects filing excessive force complaints. Based on this, the 226 OC incidents would likely have produced 20 excessive force complaints. However, only seven (3%) subjects from OC incidents have filed excessive force complaints, and five of those complaints focused on other force used prior to the OC.

One officer has been disciplined for inappropriate use of OC spray. Nine (11%) excessive force complaints were filed from the 88 reported force incidents that did not involve OC. The use of OC appears to be responsible for an overall decrease of 43% in the number of excessive force complaints resulting from reported force incidents.

Studies by the PPD show that OC is effective as an incapacitating

agent. Officers reported its effectiveness in 85% of the incidents (191 of the 226 uses).

Of the 35 incidents where officers felt OC was not effective, officers reported 11 instances of functional problems with the canisters. The trigger broke on one canister, three others failed because of an unexplained loss of pressure, and seven sprayed a mist instead of a stream of liquid as designed.

In the 24 additional instances where officers felt the OC was not effective, officers decided there was not enough time for the OC to take effect in seven incidents and used other force options. In nine other incidents there is some question whether the OC sufficiently hit the subject.

In one incident OC was ineffective when used on a person who was out of control as a result of a medical problem. In the remaining seven incidents, the officer accurately sprayed the subject and allowed time for the OC to work, but it did not produce the desired incapacitating effect. (One of the six had a partial effect, causing the man to trip and fall, but did not incapacitate). Those seven unexplained failure incidents illustrate a 97% effective rate (3% ineffective rate), which is consistent with most manufacturers' claims of a 95% effective rate.

Of the 225 subjects involved in OC incidents, 197 (87%) were intoxicated—168 (74%) were intoxicated on alcohol, 30 (13%) were intoxicated on a combination of alcohol and drugs or an unknown substance, and three (1%) were intoxicated on drugs. In the 35 incidents where officers reported OC was not effective, 11 of the 35 (31%) incidents involved one of the 30 people who were intoxicated on something other than, or in addition to, alcohol. In the seven unexplained failure incidents, three (43%) of the subjects involved were reported as being intoxicated on drugs or a drug combination.

Since going to OC, five subjects have been sprayed on more than one occasion (two each). In three (60%) of these five incidents, the subject (who had been sprayed and incapacitated by police during a previous incident) remained combative and was not incapacitated during the second incident.

While the numbers are small, it can be argued that a determined, aggressive, subject (all three subjects had numerous previous violent arrests who has experienced being sprayed previously, can partially overcome or partially compensate for the OC effects. If this is true, it would follow that an officer who has been previously exposed to OC effects could be more effective in his own defense if sprayed during an altercation.

In the 226 incidents where OC effectively controlled the person, the average number of bursts needed was 1.2 (one burst in 182 incidents, two bursts in 39). There were only six incidents where the subject received more than two bursts, and in five of the six cases the OC was still reported as ineffective.

It appears that if two bursts are delivered appropriately and are not effective, additional bursts will probably not make the product more effective. The average distance between the subject and the officer using the OC

as 4.2 feet, but officers reported it to e effective from a distance of ten feet.

There were only 12 reported istances where the OC struck unin-ended targets (11 fellow officers nd one bystander). Two officers ere contaminated by OC transfer om a sprayed subject's hands. Sev-ral incidents occurred in sub-zero mperatures and it appears, at least itially, that cold temperatures do ot hamper the delivery of OC or duce its effectiveness.

PPD officers have welcomed and cepted OC as a useful force alterna-tive. This is supported by the fact that OC was not used in only 88 (28%) of the 314 force incidents Portland report-ed since the issuance of OC. In those 88 incidents, 57 (65%) of the subjects were injured and 20 of the officers (23%) were injured. In addition, nine (10%) of the subjects in those incidents filed complaints of excessive force.

While a definitive correlation can-not be made, the department's work-ers' compensation claims decreased (both in number and in severity) since OC was adopted. An independent study by Sedgwick James of Northern New England showed that the police department was the only department in Portland municipal government to show decreases in both areas for the two fiscal year periods of 1992-93 and 1993-94.

While city government showed an increase in the number of workers' compensation claims by 6% during the two fiscal year periods, the police department's number of claims decreased 16%. Severity of the injuries was measured by resultant cost of the injuries to the city. The city as a whole showed an increase in injury costs of 178% over the two fiscal year periods, while the police department showed a decrease in injury costs of 36%.

Currently under study is the notice of claims (first step of a lawsuit) filed against the department. During the three year period of 1990-1992, the department averaged nine notices a year alleging excessive force was used during an arrest. To date, the city has received only six notices against the police department for excessive force allegations from 1993 incidents and three notices from 1994 incidents. The numbers are small, and any one inci-dent could significantly affect any per-centage increase or decrease. Howev-er, when compared to the same period prior to issuance of the spray, the nine claims to date for 1993 and 1994 rep-resent a 50% decrease in excessive force claims received.

The results of OC use in Portland are encouraging. The experience shows its usefulness and acceptance.

OC is not a solution to all of law enforcement's use of force problems. However, if it is used by properly trained officers, and is considered sim-ply as an additional tool (as another force option), it can be a valuable asset.

The significant decreases in officer injuries, subject injuries, excessive force complaints, notices of claim, and workers compensation claims since going to OC are an impressive testa-ment to its value as a force alternative. L&O

Lt. Russell J. Gauvin is Supervisor of Internal Affairs at the Portland, ME, Police Department, and also teaches at the Maine Criminal Justice Academy.

COMMUNITY VOLUNTEERS HELP POLICE REDUCE SALES OF CIGARETTES TO MINORS

Law enforcement agencies that want to increase retailer compliance with sales restrictions for cigarettes and other age-restricted products can get free materials, community volunteers and public relations support through the U.S. Junior Chamber of Commerce and its Jaycees Against Youth Smoking (JAYS) Program. The JAYS program already is being successfully implemented in hundreds of communities by Jaycee volunteers nationwide.

"We want to minimize the enforcement burden on police by educating and training retailers to be responsible merchants and making sure they know their communities will hold them accountable for their sales practices," said Gary Tompkins, national president of the U.S. Junior Chamber of Commerce. The U.S. Junior Chamber of Commerce is a national organization of young men and women, age 21 to 39, focusing on leadership training through community service.

In the JAYS program, retailers are trained on ID checking procedures, given materials to display in their stores and asked to sign a "Responsible Merchant Pledge," stating their commitment to support the law.

According to the Junior Chamber, the program is most successful in areas where the entire community gets involved. That was the case when the Jaycees in Greenville, SC, launched their JAYS program at a press conference with Jaycees, retailers, the mayor, chief of police and a D.A.R.E. officer in attendance. Many other Jaycee chapters have held similar media events to raise awareness of the program and to give positive visibility to police departments for their community involvement.

Building on the success of the first year of the program and the enthusiastic response from law enforcement, the Junior Chamber now has announced its intention to run the JAYS program in any community where police departments request it. In addition to retailer outreach, the program also involves television and radio public service announcements featuring actor Danny Glover encouraging everyone to play a role in supporting minimum age laws for cigarette sales.

"If the local police chief or sheriff wants this program in their community, we'll do everything we can to get it there and provide the direction and manpower to get it implemented," said Saunders.

To contact the Junior Chamber about the JAYS program, call 1-800-JAYCEES and ask for the JAYS program manager.

JUVENILES

SEPT 3,1996

DET.MARION KEATING
MARBLEHEAD PD

NEW LAWS EFFECTING JUVENILES

C.272 s.28 DISSEMINATING HARMFUL MATTER TO MINORSS

"matter" refers, among other things, to any printed matter, that taken as a whole, it:

1. appeals to the prurient interest of the average person applying the contemporary standars of the county where the offense was committed.
2. depicts or describes sexual conduct in a patently offensive way.
3. lacks serious literary,artistic,political,or scientific value.

All three conditions must be met to be considered obscene-harmful to minors.

In order to establish a violation of 272 s 28, you must prove that the defendant disseminated harmful matter to a minor, but that he did so knowingly; the defendant must have had a general awareness of the character of the matter.

EXEMPT: Schools, museums,library, or parent

This law has been used in our County to prosecute stores who sell sexually explicit comic books

C.270 s.6a ROLLING PAPER SALES TO MINORS

A misdemeanor (punishable by a fine of not less than $25 for a first offense,not less than $50 for a second offense,and not less than $100 for a subsequent offense)

c.119 s.58 JUVENILE DELINQUENCY_FIREARMS OFFENSES_MINIMUM DYS SENTENCES

Juveniles found delinquent by reason of a first offense violation of G.L.c.269s10(a) (carrying a firearm) s.10(c) (possessing a machine gun or sawed-off shotgun) or s.10(h) possessing a firearm) are to be committed to DYS and kept in a DYS facility for at least 180 days or their 18th birthday. It also provides that for a second or subsequent violation,juveniles are to be kept in a DYS

facility for at least one year,"which period of time shall not be reduced or suspended." (effective Feb. 25, 1996)

TOWN OF MARBLEHEAD
TOWN MEETING MAY 1, 1995

Article 43

VOTED: That the following by-law be, and hereby is, adopted.

1) Whoever, having care, custody, or control over a person under the age of eighteen fails to prevent that minor from being in a place where alcohol or an alcoholic beverage is being transported in violation of MGL ch.138, §34C, shall be punished by a fine of twenty-five dollars.

2) Whoever, having care, custody, or control over a person under the age of eighteen fails to prevent that minor from being in a vehicle where alcohol or an alcoholic beverage is being transported in violation of MGL ch. 138 §34C, shall be punished by a fine of fifty dollars.

3) Whoever, having care, custody, or control over a person under the age of eighteen fails to prevent that minor from transporting alcohol or an alcoholic beverage in violation of MGL ch. 138, §34C shall be punished by a fine of fifty dollars , unless such violation occurs in a motor vehicle.

4) Whoever, having care, custody, or control over a person under the age of eighteen fails to prevent that minor from transporting alcohol or an alcoholic beverage in violation of MGL ch. 138, §34C, while in a motor vehicle shall be punished by a fine of seventy-five dollars.

5) Whoever, having control of any residential premises, fails to keep a person under the age of eighteen from using or possessing any alcohol or alcoholic beverages on said premises shall be punished by a fine of one hundred fifty dollars. The use of alcohol for religious purposes shall not be prohibited by this ordinance. There shall be only one violation regardless of the number of minors present.
Any tenant who occupies a premise shall be presumed to be in control of same.

6) It shall not constitute a defense under this by-law that the Defendant lacked knowledge of the violation.

7) Enforcement of this by-law shall be by the police department, office of the harbormaster, and any special police with the powers of arrest.

8) Any person taking cognizance of a violation of this by-law shall give the offender written notice of the violation pursuant to MGL ch. 40, § 21D. Procedures shall be governed in accordance with that statute.

9) The town clerk shall keep a record of persons who have violated this by-law, which record shall be open for

public inspection. All monies collected as fines shall be reported to the Board of Selectmen. The Board after having allocated funds for the enforcement of this ordinance, shall distribute the balance of funds for the purpose of the prevention of alcohol use by minors.

10) The provisions of this by-law are intended to supplement, and not supersede applicable provisions of state criminal law.

11) The provisions of this by-law shall be deemed severable, and if any part of the by-law shall be adjudged unconstitutional or invalid, such judgment shall not affect other valid parts thereof.

So moved

Michael D. Greenberg
17 Ruby Ave.
Marblehead, MA 01945

APPROVED.

Moderator

A TRUE COPY, ATTEST:

TOWN CLERK, MARBLEHEAD

C.6 s.178 E

SEXUAL OFFENDER REGISTRATION

A sex offender is a person convicted of a sex offense or who has been adjudicated as youthful offender or as a delinquent juvenile by reason of a sex offense or a person released from incarceration or parole or probation supervision for such a conviction or adjudication, whichever last occurs, on or after the date of August 1, 1981. The following is a list of the sex offenses:

1. Indecent assault and battery on a child under 14
   Ch. 265 §13B
2. Indecent assault and battery on a mentally retarded person
   Ch. 265 §13F
3. Indecent assault and battery on a person who has obtained the age of 14
   Ch. 265 §13H
4. Rape (including aggravated rape and carnal abuse)
   Ch. 265 §22
5. Rape of a child under 16 with force
   Ch. 265 §22A
6. Rape and abuse of a child
   Ch. 265 §23
7. Assault with intent to commit rape
   Ch. 265 §24
8. Assault of a child under 16 with intent to commit rape
   Ch. 265 §24B
9. Kidnapping of a child under the age of 16
   Ch. 265 §26
10. Open and gross lewdness and lascivious behavior
    Ch. 272 §16
11. Unnatural and lascivious acts with a child under 16
    Ch. 272 §35A

An attempt to commit a violation of any of the above mentioned crimes or a like violation of the law of another state is also considered to be a sex offense.

DISTRICT COURT OF SOUTHERN ESSEX

CLERK'S OFFICE

_____ No. _____

TO THE DEPARTMENT OF YOUTH SERVICES

You are notified that a petition has been filed in this Court in accordance with Chapter 1073 Acts of 1973 alleging that the above child is in need of services. A hearing of this petition will be held on _____ 19____

Charles E. Flynn

19 *Clerk*

COMMONWEALTH OF MASSACHUSETTS

ESSEX, TO WIT:

To the Sheriff of the County of Essex, his Deputies, any Officer of the District Police of the Commonwealth, the Constables and Police Officers of the City of Lynn, to the Officers for attendance upon the Lynn Juvenile Court and the Court and Probation Officers of said Court:

Greeting

WE command you, and each of you, upon sight hereof, to take and bring before the Lynn Juvenile Court, holden at said City of Lynn, within the County of Essex, the body of

of said City of Lynn,
if he be found within your precinct, to answer to the Commonwealth on petition
of of said City of Lynn this day made on oath
before said Court, for being a child in need of service

at said City of Lynn and within the judicial district of said Court, against the peace of said Commonwealth and the form of the statute in such case made and provided.

And WE ALSO COMMAND you, and each of you, in the name of said COMMONWEALTH of MASSACHUSETTS, to summon the petitioner aforesaid,

to appear forthwith
before the Lynn Juvenile Court, holden at said City of Lynn, within the County of Essex, to give evidence
of what they know relative to said petition

Hereof fail not, and make return of this precept with your doings thereon.

WITNESS, THOMAS M. NEWTH, Esquire, at the City of Lynn aforesaid, this day of
in the year of our Lord one thousand nine hundred and

19 *Clerk*

ESSEX, ss. City of Lynn, 19

I have arrested the within-named Respondent

and have in Court,

and I have also this day summoned the within-named witnesses, to appear as within directed.

PROBATION
COURT
POLICE
} OFFICER

19 No.

LYNN JUVENILE COURT

ON PETITION OF

vs.

WARRANT
and
SUBPOENA

STEROIDS
A DOSE OF DANGER

It's No Secret: Steroid Use by Athletes is Pandemic

In some sports, steroid use varies widely from the prep level to the pros. More than 6% of the male high school students in America have taken steroids, according to a study conducted this year by Professor Charles Esalias of Pennsylvania State University. Of the 3,360 playoff or bowl-bound college athletes tested by the National College Athletic Association in 1986, 26 tested positive for steroids. Twenty-five of them were football players, including All-American linebacker Brian Bosworth. Those who, like the Boz, went on to the pros might have felt right at home: estimates of steroid use among professional linemen and linebackers runs as high as 50%.

While other team sports such as baseball and basketball remain essentially steroid-free, athletes have tested positive for the drug in sports as varied as cycling and track and field. The sport in which steroid use is most pronounced in weightlifting. Dr. Gloria Troendle, a senior medical officer with the US Food and Drug Administration, estimates that 80% of weightlifters and bodybuilders use steroids.

The man who brought steroids to American weightlifting was Dr. John Zeigler. Bob Goldman, in his book *Death of an Athlete*, writes that in the early 1950's Zeigler served as physician to the US weightlifting team. Traveling to championships, he learned from his Soviet counterparts that steroids provided added strength. Goldman says Zeigler, a decorated World War II veteran and ardent Cold Warrior, wasn't about to let Soviet lifters have an edge. So he introduced steroids to lifters at the York, Pa. Barbell Club. They were an immediate hit.

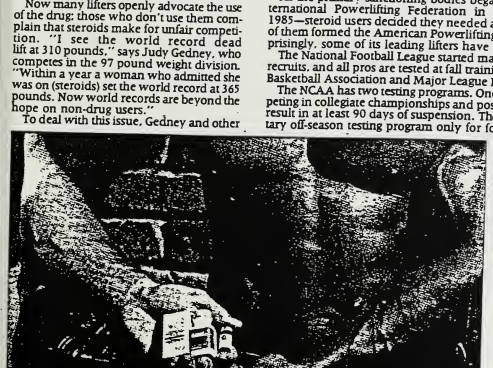
Now many lifters openly advocate the use of the drug: those who don't use them complain that steroids make for unfair competition. "I see the world record dead lift at 310 pounds," says Judy Gedney, who competes in the 97 pound weight division. "Within a year a woman who admitted she was on (steroids) set the world record at 365 pounds. Now world records are beyond the hope on non-drug users."

To deal with this issue, Gedney and other drug-free lifters, decided to set their own records. In 1983, the American Drug-Free Powerlifting Association, based in Chicago, was born. Gedney says that before competing in association-sponsored meets, athletes are subjected to urine and blood tests and a polygraph. "It's not a moral issue for me," says University of Texas kinesiology profesor Terry Todd, a former lifter who suports the drug-free league. "It's a question of an even playing field."

As the primary sanctioning bodies began to implement mandatory drug-testing—the International Powerlifting Federation in 1982 and the US Powerlifting Ferderation in 1985—steroid users decided they needed a playing field of their own. Three years ago some of them formed the American Powerlifting Federation, which forbids drug-testing. Not surprisingly, some of its leading lifters have been charged with trafficking in steroids.

The National Football League started mandatory steroid testing in 1987; it tests all college recruits, and all pros are tested at fall training camp. The National Hockey League, National Basketball Association and Major League Baseball have no policies concerning steroid use.

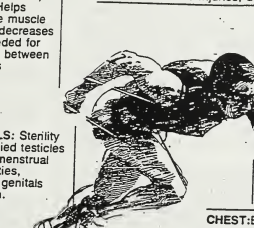
The NCAA has two testing programs. One, in effect since January 1986, tests athletes competing in collegiate championships and postseason bowl games. Evidence of steroid use can result in at least 90 days of suspension. The second, which started last January, is a voluntary off-season testing program only for football players.



At the high school level, there is no nationally coordinated policy. While the Penn State study found that steroids were popular among non-athletes (30% of those acknowledging steroid use were not members of sports teams), some observers of prep sports say the study's numbers are low. "I estimate that 30-40% of high school football teams in California have students using steroids," says Al Forthmann, the Glendale Unified School District's coordinator for physical education, recreation, athletics and substance abuse.

Football coaches at perennial local high school powerhouses Carson and Banning say their players—some of whom weigh as much as 279 pounds—do not use steroids. As for high school bodybuilders, the man in charge of the teen-aged California bodybuilding championships says forcing the competitors to submit to a drug test would impugn their integrity. "Unless I'm told, I don't assume they're on steroids," says David Smock. "I might be slandering them that way. I want to assume everyone onstage is a natural."

In the highly unlikely event that one of the youngsters was found to be "juiced up," Smock says, the penalty would be light: "It's not like Nathaniel Hawthorne. They don't end up with a scarlet S on their foreheads."



BRAIN: Increased hostility, leading to use of tranquilizers; hypertension, psychological dependence and "reverse anorexia" — eating compulsions; increased aggression, which can lead to injuries; depression.

ARMS, CHEST, LEGS: Helps stimulate muscle growth; decreases time needed for recovery between workouts

FACE: Facial hair growth and baldness in women; acne in men and women.

GENITALS: Sterility or atrophied testicles in men; menstrual irregularities, enlarged genitals in women.

THROAT: High blood pressure; clogging of arteries

CHEST: Breast growth in men; breast cancer and decreased breast size in women.

LIVER and PROSTATE: Liver cancer in men and women; prostate cancer in men.

STEROID FEARS TOUCH PRETEENS

Steroid drug abuse in the USA is so widespread that even experts were surprised by the more than 3,000 calls that flooded USA TODAY'S steroid hot line Tuesday.

Six USA Olympic stars and 17 doctors from the United States Olympic Committee took calls on the one-day hot line. The impressions were stunning, including:

► Roughly half the callers who were athletes said they'd either taken steroids or were considering doing so.

► Dozens of callers were young—junior high school students, even 10-year-olds.,

► None of the callers indicated they had any difficulty in getting steroids—legally or illegally.

Dr. Robert Voy, chief of the USOC's medical division, was impressed with the number of calls from non-athletes.

"We've suspected all along that anabolic steroid use had broken out of the athletic arena," Voy says. "We see there's a trememdous demand."

He says satistics alone aren't "as impressive as when you lift up the phone and there's an 11-year-old on the line asking about steroids."

About 70 percent of the callers were male, most under age 30. There are an estimated one-million steroid users in the USA, more than half of them under age 18.

Steroids stimulate muscle growth, but have a variety of dangerous side effects.

"I got a powerful insight into the pervasiveness of these drugs in our society," says Dr. John Murray of Burlington, Vermont.

At least two callers were persuaded to stop steroid use—one flushed 30 doses down the toilet while talking on the hot line; another stopped after hearing about health dangers.

While callers spoke to USA TODAY, the NFL was doing something—adopting an antisteroid policy.

Players who test positive for steroid a second time face the same 30-day suspension given repeated offenders for cocaine and other banned substances. Third time offenders face a one-year-to-life-ban.

THE ABC'S OF STEROIDS

WHAT ARE THEY: Anabolic (constrictive) steroids are synthetic varients of the strongest male harmone, testosterone. Most common brand names: Anadrol, DecaDurabolin, Anavar. Nicknames include "roids" and "juice."

WHAT THEY DO: In conjunction with athletic training, steroids stimulate muscle growth by synthesizing protein and cause weight gain, partly through increased water retention. They also can increase aggression, which might make an athlete train harder.

HOW THEY'RE TAKEN: Mainly in tablet form; may also be injected.

HOW THEY'RE OBTAINED: Legally, by prescription only. Illegally, through a growing black market, which new evidence shows operates into the USA from Mexico, Canada and Europe.

WHAT THEY COST: Dosages vary widely. Users can spend anywhere from $25 to $500 a month.

WHY RESEARCH IS SKIMPY: Studies are hampered because it's unethical to administer steroids in the high doses taken by some athletes. And, it's simply too soon for major long-term studies of athletes who have taken steroids and later developed health problems.

HOW DANGEROUS ARE STEROIDS: In the June 9 issue of the *Medical Tribume*, U.S. Olympic Committee sports medicine and science director Dr. Robert Voy described steroid use as a "Very complicated attack on a normal hormonal balance...When we take in a lot of hormone from the outside, the body becomes confused. It turns off its own system, so a lot of peculiar side effects occur...There have been instances of liver malfunction, because the liver is responsible for detoxifying those particular drugs...Some women have muscles that can only be achieved with anabolic steroids. They don't have the hormonal balance to develop such muscles normally...What is so dangerous about this aggressive side effect (of steroids) is that it created a psychological and physiological addiction—almost the same kind of addiction that you see with narcotics, cocaine or any of the other recreational drugs."

PRINCIPALS 'FEEL URGENCY' ON DRUG ISSUE

SADD: Students Athletes Detest Drugs

The problem of steroids in schools has reached the point that SADD has joined the war against them and other drugs.

The acronym still stands for Students Against Drunk Driving, but now it has a second meaning as well: Student Athletes Detest Drugs.

The national program was unveiled by SADD founder Robert Anastas who says the idea is to use student-athletes as anti-drug role models for the student body.

Drugs in such just-say-no contexts usually mean recreational drugs, like marijuana and cocaine. But Anastas says this program also will target performance-enhancing drugs like anabolic steroids.

"The Ben Johnson incident set us back years," says Anastas. "There wasn't a kid in American who didn't want to be that guy. And then you turn around, and the message is steroids got him all built up. That's what we're fighting."

Now SADD is fighting back—by using its existing membership of 4 million students at 15,000 high schools, 4,000 junior high schools and 1,000 colleges across the USA.

"If you tell a Kid you can get the upper hand on a scholarship by taking steroids, then they're going to do it," says Anastas. "We want to get the word out that you can go to school on your natural ability. That's the message kids need."

BEATING THE TEST

Masking agents are drugs used by athletes before drug tests to hide, or mask, the use of steroids.

While this method of trying to beat the test is not as prevalent as simply stopping steroid use in time for the drugs to clear athletes systems, there remains the possibility technology will produce new masking agents to confuse the tests.

The most recent popular masking agent is probenecid. It decreases the excretion of anabolic steroids, so steroid users hope to pass a drug test by taking probenecid before the test.

Probenecid showed up in large quantities in drug tests administered at the 1987 Pan Am Games in Indianapolis. Shortly thereafter, the drug was banned by the International Olympic Committee.

There is doubt about whether masking agents work. For instance, Dr. Bob Goldman, who supervises drug testing by the International Bobybuilding Federation, says he has seen tests come in with traces of both probenecid and steroids.

However, Goldman says, "I don't think masking agents are a dead issue, because there will always be new technologies of masking coming on board, just as there will be new types of steroids coming on board."

The dangers of drugs and alcohol are a top concern of high school principals says a new survey.

In a similar survey 10 years ago, principals didn't even include it in their list.

"This is clearly a reflection of social change," says Scott Thomson of the National Association of Secondary Principals. "Principals feel an urgency about drug and alcohol problems. They are aware of the true tragedy."

Says Leonard O. Pelicer, the University of South Carolina professor who led the study. "It's clear that there may be a new set of priorities."

Topping the principals' list: education for all in reading, writing, computing and other basic skills. Drug education was the No. 2 priority.

Other top concerns of the 1,200 principals and assistants:

► Special programs for gifted students.

► Specific criteria for teacher evaluations.

► Computer literacy for all.

► Programs for the handicapped, minorities and non-English speaking students.

► Personalized learning.

► Tougher requirements for basic skills

► Teacher incentives such as pay differential and career ladders replacing salary schedules and fixed assignments.

► Grouping students according to IQs in academic subjects.

ILLEGAL STEROID SALES SET AT $100 MILLION

The only legal way to get steroids is by prescription.

The key word in that sentence is *legal*.

Because there are many other ways to get them, including the most common: at your friendly neighborhood gym.

Other ways include through the mail (some operators advertise in muscle magazines and take credit card orders) or from unscrupulous doctors or pharmacists.

Federal authorities estimate the black-market trade in steroids at $100 million annually. Large amounts are smuggled in from Mexico, Europe or Canada and are often sold right out of the trunks of cars outside weightlifting gymnasiums.

"I'm not saying it's the gyms themselves that are pushing it," says bobybuilder Norman Rauch, a former steroid user. "But you go to any hard-core weight gym and there's somebody selling steroids. 'You need any stuff?' they'll say. 'Injectibles, orals, what do ya need?' It's right out in the open."

Arrests for selling black-market steroids are on the rise. Last week, federal agents made a big hit in Denver with what they called "Operation Adonis." Agents said they broke up a smuggling ring that brought in $500,000 worth of Mexican-made steroids in the past five years.

Although the amount of steroids seized was not released, Leslie G. Kennedy, U.S. Customs special agent for Denver, said he believed it was the largest steroid seizure ever made by customs.

Some of the confiscated steroids were for veterinary use and unfit for human consumption, says acting U.S. Attorney Mike Norton. Some might be counterfeit drugs produced in unregistered labs and labeled to resemble legitimate products, Kennedy adds.

Among the seven persons arrested were a part-time high school gym teacher, a former police officer and two mangers at suburban gyms. Norton says there were "very definite indications" some of the steroids had been sold to high school students.

"I'm glad they caught them," says Denver Broncos coach Dan Reeves. "I hope they prosecute them. Steroids are very detrimental to the health of anybody who uses them, but particularly to young people.

THE DESTRUCTIVE SIDE OF STEROIDS

More than $100 million worth of steroids are bought and sold annually on the black market, the federal government estimates. Their use among athletes has, the government says, reached epidemic proportions.

Steroids were first manufactured in the 1930's to treat chronically ill people whose catabolic, or destructive, metabolisms could not produce protein, causing them to lose mass. Medical researchers knew that the male hormone testosterone causes the retention of nitrogen, the source of amino acids and protein and so increases muscle mass. They theorized that steroids, which are synthetic versions of testosterone, would reverse protein depletion in their catabolic patients. But in th early 1960's, this use of steroids was refuted by the National Academy of Sciences and subsequently replaced with intravenous feeding. Steroids were also once used to help speed the recovery of burn victims and surgery patients, but this was abandoned in the mid '60's.

From the start, Doctors knew the drugs had dangerous properties. For all their anabolic, or building-up qualities, steroids also have androgenic effects. In men, they can decrease hormone levels and sperm production and cause breast development and prostate enlargement. In women, steroid use can bring about hair growth or baldness and deepening of the voice; menstruation may become irregular or stop; the breasts and uterus may shrink. According to FDA medical reports, steroids can also cause liver tumors, birth defects, impotence, psychotic episodes, atherosclerosis and acne.

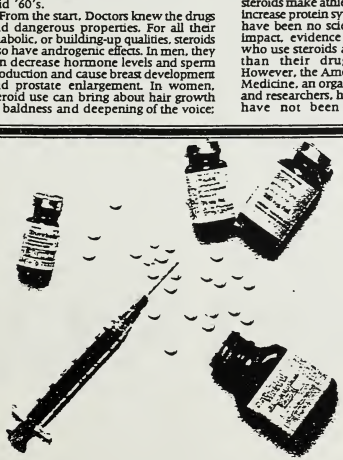
Because the side-effects can outweigh the benefits, the medical use of steroids is limited, days Dr. Glenn Braunstein, director of the Department of Medicine at Cedars-Sinai Medical Center and a clinical Professor at UCLA School of Medicine. He says legal steroids are prescribed in a handful of instances: for men who, because of a pituitary irregularity, have low levels of testosterone; to speed up maturation in certain children; to stimulate red-blood cell production in sufferers of aplastic anemia; to combat a condition that causes fluid in the larynx, and to treat inoperable breast cancer. Medical experts estimate that 3 million Americans take steroids every year.

Dr. Gloria Troendle, a senior medical officer at the FDA, says the main reason steroids make athletes stronger is that they increase protein synthesis. Although there have been no scientific studies on their impact, evidence suggests that athletes who use steroids are 10 to 15% stronger than their drug-free counterparts. However, the American College of Sports Medicine, an organization for physicians and researchers, has stated that the drugs have not been shown to increase muscular strength.

Because steroids do not fall under the Controlled Substances Act, the federal government does not impose quotas on their manufacture. But the FDA has attempted to limit the availability of steroids; only about a dozen are approved for any medicinal application. None of the types popular among athletes is available without a prescription and some are banned outright. The FDA says those favored by athletes include:

- Nandrolone decanpate (known as Deca-Durabolin. An injectable steroid used to treat anemia caused by renal failure and delayed adolescence in boys.
- Nandrolone phenpropionate (Durabolin). Also injectable, it is used to treat breast cancer.
- Testosterone cypionate. An injectable steroid used in the treatment of inoperable breast cancer.
- Oxymetholone (Anadrol-50) and Oxandrolone (Anaver). Taken in pill form, both are used to treat aplastic anemia.
- Methandrostenolone (Dianabol). Once used to treat growth failure in young boys and osteoporosis, this oral steroid was taken off the FDA's approved list in 1985.
- Methanolone enanthate (Primobolin). A non-approved injectable steroid made of animal testosterone.

In 1986, the California Legislature classified steroids as controlled substances and imposed trafficking penalties of up to 5 years and $20,000.



FAUSTIAN COMPACTS

Anabolic steroid users, says the *Reader's Digest*, have entered into Faustian compacts. "For a promise of greater size and strength — plus a heady boost in self-esteem — they're risking frightening damage to their bodies and personalities," says the *Digest*.

An estimated one million Americans use steroids, obtained mostly from the $100-million-a-year steroid black market. Even at the high-school level, one survey found that 2% of the students had used steroids, and at one particular high school, 8% of the senior boys said that they had used them.

Are steroids a death sentence? They apparently were for Pennsylvania bodybuilder Daniel Baroudi, whose death in 1983, according to the *Digest*, was the "first documented livercancer death attributed to steroid use by an otherwise healthy athlete..."

Dr. John Ziegler, who introduced steroids to American athletes before their dangers were known, later regretted his actions. Says the magazine, "Before his death in 1983, Ziegler lamented: 'I wish I had never heard the word "steroid." These kids don't realize the terrible price they are going to pay."

WARNING SIGNS

Just as there are warning signals for diseases like alcoholism and cancer, so there are signals that your teenager may be headed for trouble. One signal by itself may be meaningless, but several in tandem are worth noticing and checking out. Some of these signals are obvious, some less so, and all of them have been suggested either by professionals or by teenagers and their parents. So, have you noticed:

1. A dramatic drop in grades at school.

This is a well-known warning sign. A teenager's explanation might be anything from an overload of work to a mysterious cabal of teachers who are out to get him or her. The explanation may have varying degrees of truth in it. The other truth is that when things are going badly for a teenager, grades and attendance fail. The other point to be made is that if you are in doubt as to what your teenager's grades are because you have not seen a report card lately, there is also cause to worry. Kids who have brought home A's and B's for years but who are now earning C's and even an occasional F will "lose" their report card and hope it will not be missed. In this case, no news is not good news.

2. A major change in friends.

This is a loaded subject because most kids feel they have a right to associate with whomever they please. If you put a friend off-limits, you are likely to encourage lying because your son or daughter will feel that deception is the only option. Peer relationships are a powerful force in every teenager's life.

What a parent should notice is a narrowing of a teenager's circle of friends. Keep track of your son's or daughter's friends and if you notice that his/her circle of friends is getting smaller or he/she seems to have no friends, bring the subject up some evening and see what kind of reaction you get. The reaction may tip off whether this is a warning sign or not.

Different friends mean different values and behavior. This can be good or bad. If a teenager's values and behavior are changing, previous friends will drop away and new friends will be found who will support this new set of values or kind of behavior. "Birds of a feather . . ." is an old proverb. It got to be an old proverb because there was truth in it.

3. All you ever talk about is discipline.

It is a drag for everyone concerned to spend week after week dishing out consequences for broken curfews and messy rooms. Once disciplinary issues have become so dominant that they define your relationship with your child, you and they are in trouble. First of all, it is not fun being around them and, second, they do not like being around you. Many parents tend to be either too soft or too strict. An even balance is hard to achieve. This does not mean it is not possible. Even if you are forced into a disciplinary role for a few months by a teenager who is testing you, be sure to keep it even-handed and, at the same time, stay open to doing something for the fun of it with your boy or girl. This warning sign should be looked at in close relationship to the next one.

4. A major change in affect.

"Affect" is a word experts like to use. It means things like extreme irritability, temper tantrums or, worse yet, no apparent feelings at all—glacial indifference. Ask yourself the following questions: Are apparently reasonable comments or questions creating emotional explosions which seem to come from nowhere? Has your son or daughter gotten sneaky, refusing to look you in the eye? Has there been a switch from an upbeat, energetic approach to life to an apathetic, indifferent shrug which denies interest or involvement in anything?

Let us say you have "grounded' your teenager for some reason and he/she reacts by blowing up about who made you the boss or by shrugging the whole thing off. If this reaction is different from what you would normally expect, then it is time to look up and down this list and see what other signals you have missed.

5. A champagne taste on a beer budget.

Does your son/daughter have more money than you would expect? Has a beautiful ten-speed materialized from nowhere? One teenager told how he once brought home an expensive stereo component system, set it up in his room and played it for months before he was asked where he got it. He told his parents he borrowed it. "I wonder," he commented with a sparkle in his eye, "if they would have gone for a loan of another friend's Porsche?" On the other hand, does your kid have a lot less money with nothing to show for the spent cash? A beer taste with a champagne budget might indicate drug or alcohol misuse.

6. Things are not going well at home.

This is a warning to look inward. Evidence keeps mounting that children grow up healthy when their parents have an obviously healthful, loving relationship. Kids get into trouble when they sense their parents are in trouble with one another. The solution to a troublesome teenager might very well be fixing up things with the other people with whom you live. Kids growing up in single-parent homes do as well as other kids, but they are able to do this because they have a father or mother who has other interests and who is getting his or her own need for affection and love met. If you are divorced and have not remarried, how good are you at meeting your own needs?

7. Your kid's bedroom.

You can tell a lot about any person by looking at his or her room. Be careful not to violate privacy by reading diaries, but do notice your teenager's room. What you are looking for is change of some kind—from neatness to slob or, should you be so lucky, slob to neatness. Is it like a cave or a stage set from a horror movie? Does he/she want to paint the walls sludge brown or jet black? Are there blankets on the windows shutting out all light?

Normal disorder and off-beat colors are one thing, but a state of total disregard or indifference to health and environment is decidedly another. If you are afraid to go into your son's room because something might be lurking in there, it is a warning that something may be wrong. Time and again teenagers themselves brought up the look of a room as a clue to what was going on inside them.

8. Phone calls at odd hours.

"I'll get it!" when the phone rings at 11:30 on a school night could mean trouble. This is when drug deals are made, when plans to run away are formed. Phone calls late at night after your known bedtime are cause for concern. Once again, straight forwardness is the key. If you listen in on the phone and hear a marijuana buy being set up, confront your son or daughter about it. You will have a big argument over privacy, undoubtedly. It is better, however, to put your teenager on notice that you do not approve of late calls than to let them continue. If you are suspicious, bring out your suspicions openly. Honesty can be encouraged. "If you're buying dope, I want to know about it. I'm not going to throw you out. I love you, but I want to know about it."

9. Extreme attention-getting behavior.

Every child needs a lot of attention. As mentioned earlier, you can pay a little now or a whole lot later. If a child gets enough attention from both parents and peers in everyday life, then his or her adolescence will be no more or less difficult than anyone else's. Abnormal attention-getting behavior includes having tantrums, dressing in unusually revealing clothes (if a girl), acting younger than one's age, carving initials in one's skin, coming home chronically late, hanging around the house all the time, a fascination with fire. Unexplained loss of liquor or prescription drugs you keep at home or a "misplaced" twenty dollar bill can be conscious or unconscious cries for attention from your child. Kids in cases like this both do and don't want to get caught. Mostly they do, especially if they sense they are not risking the loss of your affection.

10. A Walter Mitty in the living room.

All of us have dreams. Many dreams should be encouraged. But if your child begins to live more and more in Walter Mittyland, if he/she dreams of doing things which are impossible, and those dreams cause a breakdown in everyday work and relationships, if a girl dreams of romance with a rock star obsessively that she shuts herself off from relationships with boys her own age; if a boy dreams of a career as an astronaut but shows no energy in school (note the sexism in the above examples), if your child has either unrealistically high expectations or no expectations at all, then he/she is walking away from reality. It is an early stage of psychosis and needs to be taken seriously. Your reaction, however, should not appear to be overly serious. Challenging your child about unrealistic fantasizing in a good-natured way can help. At least, you will find out how committed he/she is to the fantasy.

11. Your neighbors and friends are concerned.

One of the hardest things for Americans to do, particularly those who live in a place like Boulder County, is to break the taboo which says, "Mind your own business; don't be a snitch." To go to a friend or neighbor and mention your worries about their son or daughter takes guts. If someone comes to you about your child, you know it is serious. Pay attention and do something about it.

The eleven warning signs listed above are just that—warning signs. There may very well be no danger ahead. There only could be. In this case, the more there are, the more likely something is wrong. First, the family should be told about it. If this does not work, there are resources outside the family which can help.

ADVICE TO PARENTS OF ATHLETES ON STEROIDS

Steroids are dangerous, far more dangerous than meets the eye of a young athlete bent on stacking as much muscle on his frame in as short a time as possible. Quite often, in fact, the athlete is not even aware of what he is taking as a matter of course in training. You, as a parent, will likely have to supply a little perspective that young athletes often cannot do for themselves in defining just how important winning is. When a young man or woman looks and feels great right now, it is difficult for him or her to realize the long-term harm he or she is doing by taking steroids; after all, "long-term" is just too far down the road for one bent on the next game or meet.

This final appendix is meant as an aid to parents and loved ones of athletes on steroids or suspected of being on steroids. Here are the warning signs to look for.

1. Drastic change in behavior patterns (very aggressive behavior not noted before; emotional rollercoaster, unexplained fits of anger).
2. Blood in the urine (make sure this is not a tumor that damages organ structures or trauma during very aggressive play).
3. Odd hair growth or patterns (men and women).
4. Breast-egg appearance on male athletes (gynecomastia) or tender or reddened nipples; small skin growths around or on nipple.
5. Drastic decrease in adipose (fat) tissue of female breast while muscle mass increases just as dramatically.
6. Exceptional change in voice is normal in boys but not as normal in postpubescent women.
7. Child complaining of upper-right-quadrant abdominal pains, after you've ruled out liver disease.
8. Pain on urination, after you've ruled out prostatic hypertrophy, prostatic infection, and bacterial infection (in males).
9. Testicular atrophy in males.
10. Absence of menses in females.
11. Postpubescent acne in young adults after they have outgrown it.
12. Cushinoid half-moon face; looks as though the person had cotton balls in his cheeks, puffing out.
13. Change in skin color, with yellow tinge on the skin or the white sclera of the eyes. This is an early indicator of jaundice.
14. Pain in the flank after you've ruled out kidney stone, kidney infection, or tumor if there is no history of trauma. This, combined with blood in the urine, is very important.
15. Empty drug bottles, syringes, and vials. Many times a child will leave a clue when he wants help and guidance.

Don't believe for a minute that "my child would never take these drugs. He's a scholar-athlete and straight as an arrow." This is what makes the situation so critical. The kids taking these drugs are the pride of our country.

Death In The Locker Room, Dr. Bob Goldman, D.O., 1984.

SUBSTANCE ABUSE AND VIOLENCE PREVENTION
MEMORANDUM OF UNDERSTANDING
SAMPLE

I. GENERAL PRINCIPALS

The (name of city/town) School System and the (name of city/town) Police Department agree to coordinate their efforts to prevent substance abuse (defined as illegal drugs and alcohol) by the students of (name of city/town) and to prevent violence involving students of (name of city/town).

Furthermore, we agree to respond effectively and cooperatively for everyone's protection from incidents of school delinquency and criminal behavior . The joint effort of cooperative response will focus on incidents which take place on school grounds, within school property or at school sponsored events.

This agreement is entered into pursuant to the general statement of (language appropriate for each state/commonwealth) and deals with substance abuse and issues of violence, all of which would require

law enforcement response in a school setting or
law enforcement response during any school-sponsored activity
even if the event is off school grounds.

It will be the sole prerogative of school officials to impose discipline for infractions of school rules and policies.

II A. SCHOOL AND POLICE LIAISONS - PRIMARY CONTACT PEOPLE
WHY - HOW DESIGNATED - AND SUGGESTED TITLE:

In order to facilitate prompt and clear communications between school and local police personnel, the (name city/town) Public Schools and the (name city/town) Police Department agree to identify individuals on their respective staffs who will function as PRIMARY CONTACT PEOPLE.

The primary contact person s), as designated by the
Superintendent of Schools will be called the REPORTING OFFICIAL.

The primary contact person(s) as designated by the
Chief of Police will be called a JUVENILE OFFICER.

II B. SCHOOL AND POLICE LIAISONS - ISSUES OF CONCERN
THE REPORTING OFFICIALS AND JUVENILE OFFICERS - NATURE OF CONTACT:

REPORTABLE INCIDENTS: The primary contact persons from the School Department and the Police Department will deal with specific incidents of possession, use and abuse of illegal sub stances and alcohol and incidents of weapon possession and violence. In addition, the following incidents will be considered reportable by (name city/town; define such incidents).

PREVENTION STRATEGIES: In addition to above named responsibilities the PRIMARY CONTACT PEOPLE from the School Department and the Police Department will meet on a regular basis for these purposes:
(a) to discuss the scope of drug and alcohol possession and use in the schools,
(b) to identify strategies to reduce such activities and
(c) to outline the necessary action plan for implementation of such strategies.

ADDITIONAL ISSUES AND CONCERNS FOR _____:

SIGNED DATE from to

SIGNED DATE from to

MOU-SAMPLE
This document may be copied and used as is or adapted for individual situations.

III REPORTING GUIDELINES

SCHOOL REPORTS TO POLICE DEPARTMENT: MANDATORY REPORTABLE ACTS:

The following incidents MUST be reported to the Police Department ; hereinafter referred to as MANDATORY REPORTABLE ACTS taking place:

1) on school property,
2) at school functions or
3) within 1,000 foot radius of school property
(or area so designated by individual state).

MANDATORY REPORTABLE ACTS:

(a) Possession of alcohol by a minor;
(b) Possession of any controlled substance as defined in G.L.C. 94C (MA. note for particular state)
(c) Any incident in which any individual is reasonably suspected of or determined to be selling or distributing drugs or alcohol;
(d) Any incident involving serious personal injury or significant property destruction, or where there is a threat of such an activity;
(e) Possession of a dangerous weapon as defined in G.L. c 269 s. 10. (MA. note for particular state).

SCHOOL REPORTS TO POLICE DEPARTMENT; DISCRETIONARY REPORTABLE ACTS:

The following incidents referred to as DISCRETIONARY REPORTABLE ACTS MAY be reported to the Police Department at the discretion of the Reporting Officer.

DISCRETIONARY REPORTABLE ACTS include the following:

(a) Any instance in which a student is suspected of, found to be, or admits being under the influence of a drug or alcohol on school property, at school functions or within a 1,000 foot radius of school. Depending on the seriousness of the incident, the REPORTING OFFICER making the report may withhold the name of the student involved.

NOTE: Signs commonly noted as "under the influence" include:
(to be completed)

(b) Any instance in which school personnel have knowledge that an incident involving the sale, use or possession of drugs or alcohol which occurred or may occur, whether on school property, at a school function, or off-school location but involving the students at the school.

Such information would only be reported to the Juvenile Officer if the Reporting Officer has reasonable ground to believe that the information is accurate.

POLICE DEPARTMENT REPORTS TO SCHOOL: STUDENTS 17 YEARS OR OLDER

Any arrest made by (name of city/town) Police Department involving a student 17 years or older shall be reported by the JUVENILE OFFICER to the REPORTING OFFICER.

POLICE DEPARTMENT REPORTS TO SCHOOL INVOLVING STUDENTS UNDER 17 YEARS

come under two subheadings:

CATEGORY I. ARRESTS

In the event that a student under the age of 17 is arrested and a delinquency complaint is filed against her/him this information MAY be shared with the school officials subject to applicable statutes and regulations governing confidentiality.

In these instances, to insure maximum sharing of information the (name city/town) Police Department shall encourage the Probation Department at the (name) Court promptly to report the filing of such complaints to the Reporting Officer.

CATEGORY II. ISSUES OF SAFETY/NON-CRIMINAL ACTIVITY
The Juvenile Officer SHOULD report any non-criminal activity involving a student if the Juvenile Officer believes that the activity
(a) poses a serious and imminent threat to the student's safety;
(b) poses a threat to the safety of other students or
(c) by making such a report the officer would facilitate supportive intervention by school personnel on behalf of the student.

"SERIOUS AND IMMINENT THREAT" is defined as known suicidal ideation, threatened suicide, attempted suicide and victimization of the student by a parent, caretaker or other individual.

IV PROCEDURE GUIDELINES

INTRODUCTION: The primary concern of educators is to provide a nurturing climate in which learning can take place. Unfortunately, incidents of substance possession, use and abuse and violence occur on a regular basis in our schools. When dealing with such occurrences it is crucial for everyone's well-being that both the educational process and the nurturing environment are maintained to the greatest degree possible. It is through the collaborative effort of the Police Department and the School Department that this can occur.

In order to maintain a safe environment in its schools, the School Department reserves the right to search all school property for contraband or controlled substances in accordance with state laws.

NON-REPORTING SCHOOL PERSONNEL:

STUDENT TO REPORTING OFFICIAL BY NON-REPORTING OFFICIAL:
A teacher or other school employee having reasonable grounds to believe that a student has committed an act categorized either as a mandatory or discretionary reportable act, shall take or cause the student to be taken to the Reporting Official.

NECESSARY FOLLOW-UP BY NON-REPORTING OFFICIAL
A teacher or other school employee with knowledge of facts pertinent to the reportable act shall prepare and submit a report on the incident and shall deliver such a report and any physical evidence to the Reporting Official.

THE RESPONSIBILITY OF REPORTING OFFICIAL RE: INCIDENT
Once the Reporting Official has been made aware of the incident it is his/her responsibility to

(a) categorize act as mandatory or discretionary;
(b) notify parents of mandatory act and, at the discretion of the Reporting Official, notify parents of a discretionary act;
(c) notify Police Department of mandatory act, and at the discretion of Reporting Official, notify police of discretionary act.
(NOTE: Discretionary acts reported to Police Department should also be reported to parents)
(d) deliver to the Police Department pertinent physical evidence.

§ 39H. Arrest of child; notification and placement; bail; detention; right of appeal

A child may be arrested for committing the behavior described in the definition of child in need of services in section twenty-one, only if such child has failed to obey a summons issued pursuant to section thirty-nine E, or if the arresting law enforcement officer has probable cause to believe that such child has run away from the home of his parents or guardian and will not respond to a summons.

Whenever such child is arrested and the court with jurisdiction over the case is not in session, the law enforcement officer in charge of the police station or town lockup to which the child has been taken, or his designee, shall immediately notify (1) the probation officer of the division of the juvenile court department within whose district such child was arrested or resides, or such other probation officer who may have knowledge of the child and (2) a representative of the department of social services, if the law enforcement officer has reason to believe that the child is or has been in the care or custody of such department, and shall inquire into the case.

The law enforcement officer, in consultation with the probation officer, shall then immediately make all reasonable diversion efforts so that such child is delivered to the following types of placements, and in the following order of preference:

(i) to one of the child's parents, or to the child's guardian or other responsible person known to the child, or to the child's legal custodian including the department of social services or the child's foster home;

(ii) to a temporary shelter facility licensed or approved by the office for children, a shelter home approved by a temporary shelter facility licensed or approved by said office for children, or a family foster care home approved by a placement agency licensed or approved by said office for children; provided, however, that such a placement is available and, in the view of the probation officer, appropriate for the child; provided, further, that such a placement furnish said law enforcement officer with a written statement that it will make reasonable efforts to secure the child's appearance at the next available court session and that such placement will furnish the necessary transportation to such placement and to the court, unless the law enforcement officer chooses to furnish said transportation, provided, further, that such child may not be securely detained in a police station or town lockup.

Notwithstanding the foregoing requirements for placement, any such child who is arrested shall, if necessary, be taken to a medical facility for treatment or observation.

If the court finds that a child alleged to be a child in need of services by reason of persistently refusing to obey the lawful and reasonable commands of his parents or legal guardian is likely not to appear at the preliminary inquiry or at the hearing on the merits, the court shall order the child to be admitted to such bail or to be released upon such terms and conditions as it determines to be reasonable. A child who does not post bail and is not otherwise released may be detained under such terms and conditions as the court may impose in a facility operated by or under contract with the department for the care of juveniles, provided that no such child is so detained for more than fifteen days without being brought again before the court for a hearing on whether such detention should be continued for another fifteen day period. If the court decides to so continue said detention, it shall note in writing the detailed reasons for its decision. Any child aggrieved by such decision shall have an immediate right to appeal to the superior court under the procedures set forth in section fifty-eight of chapter two hundred and seventy-six; provided further, however, that in no event shall any child be detained under this section for more than forty-five days. If a child fails without good cause to respond to a summons, the court may similarly admit the child to bail, or release the child upon conditions set by the court, or, if the child fails to post bail, and is not otherwise released, detain the child subject to the above limitations. Whenever bail is imposed under this section, the provisions of section fifty-eight of chapter two hundred and seventy-six shall be applicable.

Added by St.1973, c. 1073, § 5. Amended by St.1977, c. 543; St.1991, c. 519, § 1; St.1992, c. 379, § 11.

Historical and Statutory Notes

St.1977, c. 543, approved Sept. 23, 1977, in the second (now fifth) paragraph, in the second sentence, inserted "by or under contract with the department".

St.1991, c. 519, § 1, an emergency act, approved Jan. 7, 1992, inserted the second, third and fourth paragraphs.

St.1992, c. 379, § 11, approved Jan. 13, 1993, and by § 233 made effective July 1, 1993, in the second paragraph, substituted "division of the juvenile court department" for "district court or the juvenile court".

TOWN OF ACTON POLICE DEPARTMENT

SPECIAL ORDER

TO: All Department Members DATE: April 27, 1995

FROM: Chief George W. Robinson

SUBJ: Juvenile Arrest Policy and Procedure

SPEC # 95-002 EXPIRATION: Until Incorporated as G.O.

1. AFTER MAKING ANY JUVENILE ARREST, CONTACT CONCORD DISTRICT COURT PROBATION OFFICE OR JUVENILE PROBATION OFFICER.

2. PROBATION WILL GIVE YOU TWO RECOMMENDATIONS:

   A) Release to Parent or Guardian
   B) Hold for Court

3. IF PROBATION RECOMMENDS HOLDING FOR COURT AND THE ARREST WAS FOR:

   A) CHINS Warrant
   B) Runaway(Missing Person)
   C) Other status offense

   Call the Alternative Lockup Program Pager:

   1-617-841-0053

   - The Alternative Lockup Program will pick up the child from the station, place them, and deliver the child to court for arraignment.
   - The Juvenile cannot be held in a locked cell or area for any period of time (MGL 119-39H).

4. IF THE CHARGE IS A CRIMINAL OFFENSE AND PROBATION HAS RECOMMENDED THAT THE STATION HOLD THE CHILD THEN:

   A) Determine if the charges are violent or assaultive in nature:
   B) If they are, transfer to Boxborough with a monitor
   C) If they are not, the Alternative Lockup Program will use discretion on whether or not to accept the child.

5. IF A CHILD IS COMMITTED TO THE DEPARTMENT OF YOUTH SERVICES(DYS), CALL THE DYS HOTLINE AT: 1-617-727-9315

   - The Alternative Lockup Program will not accept a DYS committed juvenile or a child on bail with DYS.

6. IF THE CHILD IS IN THE CUSTODY OF THE DEPARTMENT OF SOCIAL SERVICES (DSS), FIRST CALL THE DSS HOTLINE AT: 1-800-792-5200

   - If DSS cannot or will not assist you, call the Alternative Lockup Program.

7. IF A JUVENILE WAS TO BE RELEASED TO A PARENT AND THE PARENT CANNOT BE REACHED OR REFUSES TO PICKUP THE CHILD, CALL THE ALTERNATIVE LOCKUP PROGRAM AT 1-617-841-0053

REGIONAL COORDINATORS

WESTERN REGION

Alternative to Lockup Project
Fran Cameron
Center for Human Development
332 Birnie Avenue
Springfield, MA 01107

413-733-6624 (day)
413-733-6624 (hotline)

METRO BOSTON REGION

The Emmaus Project
David Harris
Core, Inc.
43 Trident Avenue
Winthrop, MA 02152

617-242-5040 (office)
617-241-0500 (hotline)

NORTHEAST REGION

The Northeast Lockup
Diversion Program
Karen Orfaly
Lawrence Boys' Club
136 Water Street
Lawrence, MA 01841

617-841-0053
beeper

CENTRAL REGION

The Juvenile Justice Partnership
Project
David Hart
Youth Opportunities Upheld, Inc.
81 Plantation Street
Worcester, MA 01604

508-849-5600 X236 YOU, Inc. (day)
800-435-9990
508-640-0089 United Homes
1-800-922-8169 Luk

SOUTHEAST REGION

The Southeast Detention
Alternatives Program
James Cummings
Versacare
P.O. Box 2037
140 Park Street
Attleboro, MA 02703

508-226-1660 (day)
508-226-6031 (hotline)

CRITICAL INCIDENTS

VI

Traumatic Stress Awareness

Remember the last significant critical incident to which you were exposed. Using the list below, indicate which symptoms you experienced, if any, and how long they persisted.

1. Nightmares (more than once/week) _____
2. Intrusive memories (more than once/day) _____
3. Irritability _____
4. Difficulty concentrating _____
5. Anger/hostility _____
6. Fear and/or avoidance of similar situations _____
7. Avoidance of people or things that remind you of the critical incident _____
8. Stress-related physical complaints _____
9. Flashbacks _____
10. Withdrawl from usual activities _____
11. Feeling "numb" or detatched _____
12. Depressed mood _____
13. Feeling guilty _____
14. Feeling anxious _____
15. Feeling as though the world no longer "Makes sense" _____
16. Questioning religious values _____
17. Hypervigilance _____
18. Exagerated startle response _____
19. Difficulty sleeping _____
20. Difficulty remembering the critical incident _____

Things to try:

- WITHIN THE FIRST 24 - 48 HOURS periods of appropriate physical exercise, alternated with relaxation will alleviate some of the physical reactions.
- Structure your time - keep busy.
- You're normal and having normal reactions - don't label yourself crazy.
- Talk to people - talk is the most healing medicine.
- Be aware of *numbing* the pain with overuse of drugs or alcohol, you don't need to complicate this with a substance abuse problem.
- Reach out - people do care.
- Maintain as normal a schedule as possible.
- Spend time with others.
- Help your co-workers as much as possible by sharing feelings and checking out how they are doing.
- Give yourself permission to feel rotten and share your feelings with others.
- Keep a journal, write your way through those sleepless hours.
- Do things that feel good to you.
- Realize those around you are under stress.
- Don't make any big life changes.
- Do make as many daily decisions as possible which will give you a feeling of control over your life, i.e., if someone asks you what you want to eat - answer them even if you're not sure.
- Get plenty of rest.
- Reoccurring thoughts, dreams or flashbacks are normal - don't try to fight them - they'll decrease over time and become less painful.
- Eat well-balanced and regular meals (even if you don't feel like it).

For Family Members & Friends

- Listen carefully.
- Spend time with the traumatized person.
- Offer your assistance and a listening ear if they have not asked for help.
- Reassure them that they are safe.
- Help them with everyday tasks like cleaning, cooking, caring for the family, minding children.
- Give them some private time.
- Don't take their anger or other feelings personally.
- Don't tell them that they are "lucky it wasn't worse" - traumatized people are not consoled by those statements. Instead, tell them that you are sorry such an event has occurred and you want to understand and assist them.

COMMON SIGNS AND SYMPTOMS OF EXCESSIVE STRESS	
Cognitive Confusion in thinking Difficulty making decisions Disorientation	**Physical** Excessive sweating Dizzy spells Increased heart rate Elevated blood pressure Rapid breathing
Emotional Emotional shock Anger Grief Depression Feeling overwhelmed Hopelessness/helplessness	**Behavioral** Changes in ordinary behavior patterns Changes in eating Decreased personal hygiene Withdrawl from others Prolonged silences

POTENTIALLY TRAUMATIZING EVENTS	
INDIVIDUAL	COMMUNITY
1. Automobile accident	1. Earthquake
2. Sexual assault/abuse	2. Hurricane
3. Any life threatening experience	3. Fires
4. Robbery	4. Flood
5. Serious physical injury/abuse	5. Large scale environmental pollution
6. Perception of serious threat to self or significant other	6. Multiple injury/fatality accidents
7. Psychological abuse	7. Terrorism
8. Severe injury/death of one's own child	8. Child related traumatic events
9. Suicide of family member or co-worker	9. Homicides in the community
10. Homicide	10. High publicity crimes of violence or sex
11. Line of duty injury or death among law enforcement or other first responders	11. Community wide disasters
12. Multiple homicides within a community	
13. Injury or death to a child	
14. Observing any of the individual or community trauma listed above	

THE USE OF DEADLY FORCE

MASSACHUSETTS CRIMINAL JUSTICE TRAINING COUNCIL'S POLICY ON: "USE OF FIREARMS/DEADLY FORCE"

DEADLY FORCE: Is the degree of force likely to result in death or serious physical injury. The discharge of a firearm toward a person constitutes the use of deadly force.

SERIOUS BODILY INJURY: A bodily injury that creates a substantial risk of death; causes serious, permanent disfigurement; or results in long term loss or impairment of the functioning of any body part.

Officers **SHALL NOT** use deadly force except to protect themselves or another person from imminent death or serious bodily injury.

Basically, a police officer has always been able to use deadly force in a self defense/defense of others situation if he/she could show the following four (4) basic elements

1. **ABILITY** — to cause death or serious bodily harm, i.e. a gun, knife, club, etc.

2. **OPPORTUNITY** — to take advantage of his ability to cause death or serious bodily injury.

3. **LIFE IN IMMINENT JEOPARDY** — even though the suspect has the ability and the opportunity, the threat of death or serious bodily in injury must be imminent.

4. **REASONABLE ALTERNATIVE** no other reasonable alternative can exist.

Officers **SHALL NOT** use deadly force to apprehend a fleeing felon unless……..

1. the felony involved the use or threatened use of deadly force; and

2. the felon's escape would result in imminent death or serious bodily injury to the officer or another if apprehension was delayed.

SHOOT TO STOP vs. SHOOT TO KILL

When using deadly force, a police officer is legally justified in shooting to ***STOP*** an individual who is using or threatening to use (imminent) deadly force.

A police officer is ***NOT*** justified in shooting to kill an individual, he is legally justified in shooting to stop.

A police officer does ***NOT*** shoot to kill or to wound, he shoots to ***STOP.*** A wounded suspect or a dead suspect may be the result, but the police officer is only justified in shooting to stop.

When a police officer uses his firearm, as allowed by law, three things may occur…..

1. The officer will miss, hopefully this will not happen, but there is a definite possibility of this occurrence.
2. The suspect will be wounded and will survive.
3. The suspect will be killed as a result of being shot.

No matter what the personal feelings of the officer, he/she has no control over what happens to the suspect once his/her weapon has been discharged. What happens is a result over which he/she has no control. Although there is a much greater possibility that a person with a chest wound will die as opposed to a person with a leg wound, the result is definitely beyond the officer's control

A combination of factors will result in the final determination as to whether a person who has been shot will live or die. These factors include, but are not limited to…..

- specific shot placement
- age of suspect
- health of suspect
- will to survive
- availability of medical care

WHEN IS A SUSPECT STOPPED?

A suspect is stopped when he is effectively prevented from using or threatening the use of deadly force.

This determination can only be based on the totality of circumstances involved in the incident.

A police officer is ***NOT*** required to count his/her shots.

EXAMPLE #1: A police officer in a self defense situation, at a distance of ten (10) feet from his assailant, fires two (2) shots. The suspect is hit and falls to the ground. The suspect's firearm slides fifteen (15) feet from him/her.

This is an easy example of a suspect being effectively stopped. The officer must stop firing and now has a duty to aid the victim. An officer continuing to shoot after the suspect has been effectively stopped, puts the officer in a position of attempting to kill the suspect.

EXAMPLE # 2: A police officer in a self defense situation, at a distance of twenty-five (25) feet from his assailant, fires two (2) shots. The suspect falls to one knee with his firearm still in hand.

This is an easy example of a suspect, after being shot, still reasonably being a threat of using deadly force. The officer is justified in shooting until the suspect is no longer in such a position.

WHERE IS THE OFICER'S AREA OF AIM?

When a police officer uses his weapon, he should aim for an area commonly referred to as ***center of the mass***. Contrary to popular belief, ***center of the mass*** is not always going to be the chest area located directly above the sternum. The mass is the target area available for the officer to shoot at. ***Center of the mass*** is the center of that area. (i.e., if the suspect is shooting from a parked motor vehicle through the driver's window, ***center mass*** may be the throat area or even the head because that is the available target area).

WHY DO WE SHOOT TO CENTER MASS?

In order for a police officer to effectively ***STOP*** an individual when he/she is legally justified in using deadly force, the officer must be able to hit the target.

Under the stress of combat shooting situations, the best way to achieve accuracy and the goal of stopping the suspect is by shooting to ***center mass.***

Theories of shooting a weapon out of a suspect's hand or disabling type shooting are totally unrealistic Hollywood type approaches to combat situations when use of deadly force is involved.

Attempts at disabling type shooting or warning shots only enhance an already acutly dangerous and life threatening situation.

FEDERAL CASES ON THE USE OF DEADLY FORCE AND EXCESSIVE FORCE BY POLICE OFFICERS

MICHAEL CALLAHAN
Chief Division Counsel
Federal Bureau of Investigation
Boston, Massachusetts
March, 1996

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(I) CONSTITUTIONAL STANDARD FOR USE OF DEADLY FORCE

A. TENNESSEE v. GARNER, 471 U.S. 1 (1985)

At 10:45 p.m., on October 3, 1974, two Memphis, Tennessee Police Officers responded to a burglary in progress call. Upon arrival, a neighbor told the officers that she heard glass breaking in the house next door. One officer went to the rear of the house, heard a door slam and saw a suspect run across the backyard. The suspect, a 15 year old black male, stopped at a six foot high chain link fence at the rear of the yard. The officer used a flashlight to enable him to see the suspect's face and hands. He saw no weapon and later testified that the was reasonably sure that the suspect was not armed. The officer called out to the suspect to halt and identified himself as a police officer. When the suspect ignored the officer's command to halt and began to climb over the fence, the officer shot the suspect in the back of the head. He died shortly thereafter in a nearby hospital.

The father of the deceased suspect filed a lawsuit in the United States District Court (USDC) pursuant to Title 42 U.S.C. Section 1983, against the officer who fired the fatal shot, the director of the police department, the mayor and the City of Memphis. The lawsuit alleged that the shooting violated the Fourth Amendment to the United States Constitution inasmuch as it amounted to an unreasonable seizure in violation of the Fourth Amendment. After a three day bench trial, the USDC Judge entered a judgment in favor of all defendants. Claims against the mayor and the director of the police department were dismissed for lack of evidence and the Court ruled that the officer who fired the shot was authorized to do so by a Tennessee state statute which permitted police officers to use deadly force when they have probable cause to believe that the person to be shot has committed a felony and no alternative means of apprehension are available. The District Court Judge ruled that the State of Tennessee "fleeing felon statute" was constitutional and justified the shooting.

The United States Court of Appeals for the Sixth Circuit reversed the judgement of the District Court and the United States Supreme Court affirmed the judgement of the Court of Appeals.

In a 6-3 decision written by Justice WHITE, the Court agreed with the Court of Appeals that the use of deadly force to make an arrest is a "seizure" under the Fourth Amendment and, therefore, must be reasonable in order to be constitutional.

In deciding whether it is reasonable in Fourth Amendment terms to permit deadly force to be used against all fleeing felons, the Court examined both the underlying justification for fleeing felon statutes and whether individual jurisdictions have continued their unrestricted use. With respect to the former, the Court observed that fleeting felon statutes, which authorize use of deadly force upon any fleeing felon when necessary to prevent escape, are based upon the English common law rule. The Court noted that at common law virtually all felonies were punishable by death and therefore the use of deadly force to prevent a felon from escaping, imposed no greater punishment upon the felon than he had already brought upon himself. The Court observed that it is no longer true that all felonies are punishable by death. In fact, the great majority of felonies are punishable by penalties far short of death.

With respect to whether individual jurisdictions have continued unrestricted use of fleeing felon statutes, the Court observed that although almost half of the states retained common law based fleeing felon statutes, twenty states have restricted use of deadly force to situations wherein the escaping felon used or threatened deadly force or was armed or was likely to endanger life if not quickly apprehended. Moreover, the Court observed that most police departments had placed policy restrictions upon their officers with respect to use of deadly force. The Court explained that most big city American police departments permitted deadly force only when a felon presented a threat of death or great bodily harm. The Court noted that no evidence had been presented to indicate that law enforcement had been severely hampered in those jurisdictions adopting more restrictive deadly force policies by regulation or statute.

In light of the foregoing, the Court ruled that the Tennessee fleeing felon statute was unconstitutionally broad because it permitted use of deadly force against unarmed and non-dangerous fleeing felons. The Court explained that the police may not seize unarmed or non-dangerous fleeing felons by shooting them dead. Indeed, the Court concluded that such seizures are unreasonable in Fourth Amendment terms.

The Court then set forth the constitutional standard which would justify the use of deadly force by police officers. This constitutional standard had four components which are set forth below:

1. The officer must possess probable cause to believe that the suspect has committed a felony.

2. The officer must give the suspect a warning, if feasible.

3. The officer must have probable cause to believe that the suspect poses a threat of serious physical harm to the officer or other people.

4. The use of deadly force must be necessary to prevent escape.

With respect to number 3 as set forth above, the Court explained, "Thus, if the suspect threatens the officer with a weapon, or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given." Basically, GARNER imposes three requirements upon the police before deadly force can be used. First, the suspect must be dangerous as indicated above. Second, deadly force must be necessary to prevent escape or according to FBI policy, deadly force must be necessary to achieve safe control of a dangerous suspect. Third, a warning must be given, if feasible, prior to using deadly force. The federal cases set forth in this handout provide some examples of these principles, as examined by various federal circuit courts of appeal.

B. GRAHAM v. CONNOR, 490 U.S. 386 (1989)

GRAHAM was a diabetic and he believed that he was in the early stages of a diabetic insulin reaction. He asked his friend BERRY to drive him to a local market so he could purchase orange juice. Upon arrival at the market, GRAHAM entered and saw that it was too crowded. He quickly left the market and entered BERRY's car. A Charlotte, North Carolina Police Officer observed GRAHAM enter and leave the market. He stopped BERRY's car after it left the market. BERRY told the officer that GRAHAM was suffering from an insulin reaction. Meanwhile, GRAHAM exited the car and ran around it twice. He then passed out and fell to the ground. Back-up officers arrived and one handcuffed GRAHAM tightly behind his back. The officers then carried GRAHAM to the hood of a police car and laid him face down on the hood. Later, four officers removed him from the hood and threw him head first inside the police car. GRAHAM suffered a broken foot, cut wrist, bruised forehead and an injured shoulder.

Later, GRAHAM filed a lawsuit under Title 42 U.S.C. Section 1983 in which he alleged excessive force. The United States District Court dismissed the suit and analyzed it under a Fourteenth Amendment due process standard. The Court decided that the due process standard requires proof that officers acted with malicious purpose or sadistic intent. Since plaintiff offered no proof of malice, the Court ruled that no due process violation occurred.

Eventually, the case was accepted for review by the U.S. Supreme Court and the ruling of the District Court was reversed.

The Supreme Court ruled that excessive force claims arising out of arrest or detention situations should not be reviewed under a due process standard and that proof of malice in these cases is not required. Instead, the Court ruled that these claims must be brought and examined under a Fourth Amendment "objective reasonableness" standard. The Court explained that "[A]ll claims that law enforcement officers have used excessive force - deadly or not - in the course of arrest, investigatory stop or other 'seizure'...should be analyzed under the Fourth Amendment and its 'reasonableness standard' rather than the 'due process' approach."

In deciding whether excessive force was used, the Court stated that the following factors should be examined:

1. The severity of the crime.

2. The degree of danger to the police and others.

3. Whether the suspect actively resisted.

4. Whether the suspect attempted flight.

The Court also observed that the use of force by police must be judged from the perspective of a reasonable police officer on the scene rather than with 20/20 hindsight. The Court explained that reasonableness must embody allowance for the fact that police are often forced to make split-second judgements in circumstances that are tense, uncertain and rapidly evolving. The Court remanded the case back to the lower court for further proceedings. The principles articulated in CONNOR apply in deadly and non-deadly force situations.

(II) FEDERAL CASE REGARDING NON-DEADLY FORCE

A) DEAN v. CITY OF WORCESTER, ET AL, 924 F.2d 364 (1st Cir. 1991)

On September 3, 1985, an officer assigned to the Violent Fugitive Arrest Squad of the Massachusetts State Police, received information from a reliable informant that RICHARD BURBO, an escapee from the Massachusetts Correctional System, was staying with an unknown female at a Worcester apartment. The informant stated that BURBO was armed with a revolver and that he had expressed the intention to shoot any officer that attempted to arrest him. At the time of his escape, BURBO was serving sentences for Armed Assault, Armed Robbery and Rape.

The next day, Massachusetts State Police Officers and Officers of the Worcester Police Department located a male suspect, resembling BURBO, who was seated on a rock at a city bus stop near the apartment at which BURBO was reportedly staying. The officers decided to apprehend the subject at the bus stop rather than risk endangering the woman and her child who supposedly resided in the apartment with BURBO. The officers decided that BURBO would have to be apprehended quickly so as to avoid endangering innocent bystanders and the officers themselves. Unbeknown to the police, the person they were about to seize was not BURBO but, instead, was Mr. DEAN.

The police drove a car onto the sidewalk directly in front of DEAN. As DEAN got to his feet, two officers jumped from the police car and pushed DEAN down causing his face to hit the sidewalk. One of the officers placed a gun to DEAN's ear and threatened to blow his head off if he moved. DEAN felt a knee in his back and a slight kicking to his feet. He was lifted to his feet, tightly handcuffed and pushed against the wall and in the process he suffered a cut to his scalp. DEAN told the police that he was not BURBO and that they had arrested the wrong person. After arresting DEAN, the officers noticed that DEAN appeared to be taller than BURBO. They decided to place DEAN in a cruiser while they executed a search warrant for the nearby apartment where BURBO was staying. BURBO was subsequently arrested inside the apartment and a .38 caliber pistol was seized from under a cushion on the couch where BURBO had been sitting. The police explained their mistake to DEAN and released him. DEAN had been detained for about 30 minutes and suffered minor physical injuries including a cut nose and scalp, a scratch on his neck and welts on his back. He also alleged that he later suffered from severe emotional trauma as well.

Two years later, DEAN filed a suit in the United States District Court pursuant to Title 42 U.S.C. Section 1983 and claimed that the police officers used excessive force in effecting this arrest. The District Court dismissed the lawsuit against the police officers and DEAN appealed.

On appeal to the First Circuit, DEAN argued that the actions of the police officers in this case were unreasonable in Fourth Amendment terms for two reasons. First, DEAN argued that the police lacked probable cause to arrest him because he was taller than BURBO. The Court rejected this claim by noting that the record reflected that both DEAN and BURBO were of similar physical appearance and that DEAN was arrested near the apartment house at which BURBO was believed to be staying. Moreover, although DEAN may have been somewhat taller than BURBO, DEAN was seated on a rock when first observed by the police. When the police approached him in the automobile for the purpose of arrest, the fact that the officers failed to notice, as they jumped from the police car, that DEAN was somewhat taller than BURBO could not be considered unreasonable, particularly in light of the tension and urgency that prevailed at the moment of the arrest.

Secondly, DEAN argued that the police used excessive force in apprehending him. Because the police had probable cause to arrest DEAN thinking he was BURBO, they had the right to use whatever force would have been appropriate if, in fact, they were arresting BURBO and not DEAN. The First Circuit observed that the use of force in connection with an arrest or an investigative detention is controlled by the standard of "objective reasonableness" as set forth in the recent United States Supreme Court case of GRAHAM v. CONNOR, 109 S. Ct. 1865 (1989). The "objective reasonableness" standard of CONNOR requires the lower Federal courts to analyze excessive force claims in light of all the circumstances confronting the arresting officers at the time of the arrest. Therefore, the First Circuit, in considering the facts surrounding the arrest of DEAN, observed that the police possessed information from a reliable informant that BURBO was believed to be armed and had made a verbal threat to shoot police officers who might arrest him. Moreover, he had an extensive record of violent crimes. Furthermore, the police were required to make the arrest in a public place which subjected innocent bystanders to the possibility of being harmed. The First Circuit also looked to the manner in which the arrest was actually carried out and observed that DEAN suffered only minor injuries and did not seek medical attention until the next day. In rejecting DEAN's second argument that the police used excessive force in arresting him, the First Circuit concluded its opinion with the following comment: "These minor physical injuries

simply are insufficient to support an inference that the officers used inordinate force to effect the intended arrest in the tense, uncertain and rapidly evolving circumstances surrounding the reasonably perceived need to subdue an armed felon on a busy street."

Finally, the Court observed that DEAN likewise alleged psychic injury as a consequence of the police threat against him to use a gun if he moved. The Court rejected this claim on the ground that, since the officers, after the warning, could have employed violent force to prevent the escape of a person with BURBO's record for violent assaults and threats against the police, their advance warning that violent force would be used was a reasonable precaution against the need to use it.

(III) **FEDERAL CASES ON DEADLY FORCE**

A) **ROY v. INHABITANTS OF THE CITY OF LEWISTON, ET AL, 42 F.3d 691 (1st Cir. 1994)**

On August 13, 1991, Officers WHALEN and MERCER of the Lewiston, Maine Police Department were sent to investigate a domestic violence report at MICHAEL ROY's home. Upon arrival, they were told by Mrs. ROY that her husband was armed with two knives and had threatened to use them upon any officer that approached him. The officers found ROY in the back yard on the ground and when they roused him, they learned he had been drinking. They allowed ROY to enter his home and he returned carrying a steak knife in each hand. Both officers drew their handguns and ordered him to drop the knives. He advanced, flailing his arms while continuing to hold the knives. The officers retreated back to a sharp downward incline and repeated their warnings without success. ROY made a kicking-lunging motion toward the officers and Officer WHALEN shot him twice. ROY was seriously injured but later recovered and sued the officers, the City and the Police Chief. The suit against the officers was filed pursuant to 42 U.S.C. 1983 and it alleged that the police used unreasonable deadly force against him. The suit against the City and the Chief alleged inadequate training because the officers had not been properly trained in the use of non-lethal alternatives for subduing dangerous but intoxicated persons.

The District Court ruled in favor of all defendants and ROY appealed. The First Circuit affirmed and analyzed the police conduct in light of recent Supreme Court decisions dealing with the use of force by police officers and the defense to constitutionally based lawsuits, which is known as "Qualified Immunity." In GRAHAM v. CONNOR, 490 U.S. 386 (1989), the Supreme Court stated that excessive force claims against police officers are to

be measured by an "objective reasonableness" standard under the Fourth Amendment. Moreover, the Court said that in deciding whether reasonable force was used, the lower courts must make allowance for the need of police officers to make split-second judgements in circumstances that are tense, uncertain and rapidly evolving. In ANDERSON v. CREIGHTON, 483 U.S. 635 (1987), the Supreme Court ruled that police officers are entitled to qualified immunity from civil suit unless they are plainly incompetent or knowingly violate the law. The Court pointed out that its standard for determining whether an officer is entitled to immunity was whether the officer had acted with objective reasonableness under the circumstances. The First Circuit pointed out that the standard of judgement in excessive force cases and qualified immunity defense cases was essentially identical. The Court of Appeals stated that the Supreme Court has decided to surround the police who make on-the-spot choices in dangerous situations with a fairly wide zone of protection in close cases. The Court explained that in close cases, a jury does not automatically get to second-guess life and death decisions even though the plaintiff has a plausible claim that the situation could have been handled differently.

The First Circuit ruled that the officers in this case were entitled to qualified immunity because their conduct was not objectively unreasonable given the fact that they were facing tense, uncertain and rapidly evolving circumstances. The Court was not enthusiastic about endorsing the use of deadly force in these circumstances but felt constrained by Supreme Court precedent to rule in favor of the police. The Court's lack of enthusiasm can be observed in the following comment, "[I]n our view a jury could not find that his conduct was so deficient that no reasonable officer could have made the same choice as WHALEN--in circumstances that were assuredly tense, uncertain and rapidly evolving. Put differently, WHALEN's actions, even if mistaken, were not unconstitutional." The Court observed that apart from the suggestion that mace should be carried by all officers, the plaintiff's expert did not explain in his affidavit how the police could have subdued ROY any other way. The Court also stated that it was not obvious that it would have been better for the police to retreat and leave an armed suspect on the premises--one who had just committed an apparent felony in the presence of the police. The Court was obviously not persuaded that the expert's suggestion regarding mace or the idea that the police should have left the premises were reasonable alternatives.

With respect to the City and the Chief, the Court stated that there was nothing in the plaintiff's expert's affidavit which would make anyone conclude that the "failure to provide mace was so unusual or patently improper as to reflect deliberate

indifference" on the part of these defendants. It should be noted that the plaintiff's expert claimed that ROY could have been arrested without using firearms. He stated that the officers should have been equipped with red pepper mace. The First Circuit did not seem impressed with this line of argument for any of the defendants.

B) PLAKAS v. DRINSKI, 19 F.3d 1143 (7th Cir. 1994)

PLAKAS was involved in an automobile accident and agreed to the Sheriff's Department request to be tested for intoxication. Officer KOBY handcuffed him behind his back and placed him in a police car. PLAKAS complained about the handcuffs hurting him but the officer refused to remove them citing Department policy. During the drive to the station, KOBY heard the rear door open and he hit the brakes. PLAKAS fell forward and hit the screen which separated the front and rear seats. Suddenly the rear door flew open and PLAKAS fled into snow covered woods. This occurred at approximately 10:00 p.m. on February 2, 1991. KOBY put out a call for assistance and other Sheriff's Deputies and Indiana State Police Officers responded. PLAKAS ran to a nearby home because he knew the owner. Officers KOBY and CAIN entered the home with consent and observed PLAKAS bring his hands round to the front of his body, while remaining handcuffed. PLAKAS became loud and combative and picked up a fireplace poker. He rushed at KOBY and swung at him with a two handed swing of the poker. KOBY was hit on the wrist and backed away. PLAKAS slammed the poker into the wall and beat his head into the wall.

PLAKAS left the house and ran into the woods while still holding the poker. The police gave chase and caught up to him in a clearing. The officers were about ten feet away from the suspect. For the next 15 to 30 minutes, Officer DRINSKI tried to convince PLAKAS to surrender. Two other officers were nearby. PLAKAS pointed the poker at DRINSKI and said, "Either you're going to die here or I'm going to die here. Go ahead and shoot, my life isn't worth anything." PLAKAS then charged DRINSKI with the poker raised. DRINSKI backed up but stopped when he thought he could not retreat further because something was behind him. PLAKAS cocked the poker over his head when he was two arm lengths away and DRINSKI fired once, hitting PLAKAS in the chest. PLAKAS died and his wife sued DRINSKI under Title 42 U.S.C. Section 1983 for allegedly violating the constitutional rights of PLAKAS by using inappropriate deadly force. She also sued Newton County, Indiana for failing to properly provide its officers with appropriate non-lethal equipment to be used as alternative to the use of deadly force. The District Court ruled on a Summary Judgement Motion in favor of the defendants and

plaintiff appealed. The Seventh Circuit affirmed the ruling of the District Court.

Plaintiff argued on appeal that Officer DRINSKI had a constitutional duty to use alternative methods short of deadly force to resolve the situation confronting him. The Court observed that DRINSKI had three alternatives to the use of deadly force. He could have attempted to keep some form of barrier between him and PLAKAS (like a row of hedges), or he could have used a disabling spray, or he could have used a dog to disarm him. The Court rejected this argument, but first noted that the plaintiff was correct in refraining from arguing that the police should have simply left the scene and attempted to arrest PLAKAS another day. The Court stated that there is no precedent in the Seventh Circuit or any other which holds that the Constitution requires police to use all reasonable alternative to avoid a situation where deadly force can be justifiably used. The Court held that the Fourth Amendment does not require the use of less deadly alternatives when deadly force is otherwise reasonable under Supreme Court precedent. The Court explained, "[W]e recognize that the decision to shoot can only be made after the briefest reflection, so brief that reflection is the wrong word. As PLAKAS moved toward DRINSKI, was he supposed to think of an attack dog, of (Officer) PERRAS' CS gas, of how fast he could run backwards? Our answer is, and has been, no, because there is too little time for the officer to do so and too much opportunity to second guess that officer."

The Court also stated that it did not intend to judge the conduct of the officer using deadly force by examining segments of the event that occurred prior to the time when deadly force became necessary. The Court observed that, "reconsideration will nearly always reveal that something different could have been done if the officer knew the future before it occurred." The Court explained that it intended to judge the officer's use of deadly force from the moment when PLAKAS charged DRINSKI with the poker raised. The Court concluded that DRINSKI's use of deadly force was reasonable under the circumstances.

Plaintiff argued that the County should be liable for not providing its officers with the type of equipment that would allow them to use non-lethal alternatives in deadly force situations. Plaintiff claimed that the officers should have been issued a canister of gas or had a trained canine nearby. Officer DRINSKI had no gas or chemical spray issued to him. The Court rejected this argument and observed, "There is,...not a single precedent which holds that a governmental unit has a constitutional duty to supply particular forms of equipment to police

officers." "We do not think it is wise policy to permit every jury...to hear expert testimony that an arrestee would have been uninjured if only the police had been able to use disabling gas or a capture net or a taser (or even a larger number of police officers) and then decide that a municipality is liable because it failed to buy this equipment (or increase its police force)." Likewise, the Court refused to impose a constitutional requirement to train police in the use of all available equipment beyond the acceptable training program already mandated.

C) SCOTT v. HENRICH, 39 F.3d 912 (9th Cir. 1994)

Officers HENRICH and FLAMAND, representing the Butte-Silver Bow Law Enforcement Agency, responded to a report of a man firing a gun in the City of Butte, Montana. On arrival, they were told by a motel manager that the gunman had entered a building across the street through the street level door. Another witness told them that he had seen the shooter fire one or two shots and that he was staggering and acting crazy. Officer FLAMAND observed a man in a second story window of the building. The officers approached the street level door to the building where the gunman was suspected to be and kicked the door. They yelled something like, "Police, police officers, open up." They received no immediate response and once again announced their identity while knocking on the door. They heard fumbling with the door and the door opened. SCOTT was standing in the doorway, holding a gun which was pointed at the police. Officer HENRICH fired a shot at SCOTT which missed. FLAMAND, believing that SCOTT fired the shot, fired four shots at SCOTT which resulted in his death. SCOTT's wife filed a lawsuit against the officers, the Police Department, the County and the City of Butte pursuant to Title 42 U.S.C. Sec. 1983, and alleged that the officers violated the Fourth Amendment rights of the deceased by failing to use alternative means before approaching the door and engaging in a deadly confrontation with SCOTT. The District Court dismissed the suit against the officers on Qualified Immunity grounds and the municipal defendants were likewise dismissed for lack of a constitutional violation.

The Ninth Circuit affirmed and rejected the plaintiff's argument that the officers were required to employ alternative measures before approaching the door and confronting SCOTT. Plaintiff filed an affidavit with the District Court which was prepared by a police expert. The affidavit alleged that prior to approaching the door, the police should have developed a tactical plan, sealed off possible escape routes, called for back-up and tried to persuade him to surrender. The Court dismissed the alternatives argument by stating that the Fourth Amendment only requires that police officers act reasonably when using deadly

force. It does not require them to use less intrusive alternatives which may have been available to them. The Court explained, "Requiring officers to find and choose the least intrusive alternative would require them to exercise superhuman judgement. In the heat of battle with lives potentially in the balance, an officer would not be able to rely on training and common sense to decide what would best accomplish his mission. Instead, he would need to ascertain the least intrusive alternative (an inherently subjective determination) and choose that option and that option only. Imposing such a requirement would inevitably induce tentativeness by officers, and thus deter police from protecting the public and themselves. It would also entangle the courts in endless second-guessing of police decisions made under stress and subject to the exigencies of the moment." The Court examined the response of the police in this case and concluded that they acted reasonable. The Court explained that, "It's hardly unreasonable for officers to take arms, knock on the door of an apartment and identify themselves as police when an armed man who...recently fired shots and is acting crazy lurks inside."

The Court rejected the possibility of liability for the municipal defendants because there was no underlying violation of the Constitution by the officers themselves.

D) **MENUEL v. CITY OF ATLANTA, 25 F.3d 990 (11th Cir. 1994)**

On July 24, 1989, at about 12:30 a.m., two Atlanta Police Officers responded to a 911 emergency phone call from the sister of JESSIE MENUEL. Upon arrival, the officers spoke with MENUEL's brother and learned that MENUEL had choked her father after having an argument with him. The officers were told that MENUEL was inside the house and the officers knocked on the door. MENUEL suddenly opened the door and lunged at them, while swinging a butcher knife in their direction. The officers retreated and MENUEL slammed the door and locked herself in her father's bedroom. The officers entered the home which was owned by MENUEL's father and gathered outside the locked bedroom door. They tried futilely to induce her to surrender. Officers were told by family members that MENUEL had no other weapons and family members asked the officers at one point to leave so they could handle the matter themselves. The police refused to leave and devised a plan to enter and arrest her. The plan was discussed with family members and the father agreed with it, although some family members may have disagreed. The plan was implemented when one officer knocked on the bedroom window for the purpose of creating a diversion. At that moment, other officers forced open the bedroom door and entered the darkened

room. One carried a vacuum cleaner which was to be used defensively in case she rushed them with the knife. Upon entry, four officers were met with gunfire when MENUEL fired at them with a .25 caliber pistol. Three of the officers returned fire. MENUEL was hit six times and died of her wounds.

Later, Mr. MENUEL filed a lawsuit against the officers involved in the shooting and the City of Atlanta. The lawsuit alleged that the police used unconstitutional excessive force in seizing MENUEL and that the City maintained an inadequate system of training officers to respond to and control violent and mentally disturbed persons. The District Court refused to dismiss the lawsuit and denied the officers claim of Qualified Immunity. The Eleventh Circuit reversed and entered a judgement for all the defendants. Initially, the Court ruled that no Fourth Amendment seizure of MENUEL occurred until the officers shot and killed her. The fact that she was surrounded by the police prior to the shooting did not amount to a seizure. The Court observed that a potential arrestee who is surrounded but neither physically subdued or willing to yield, remains "[C]apable of generating surprise, aggression, and death." The Court next concluded that the officers did not use excessive force in responding to MENUEL's attempt to shoot them when they entered the bedroom. The Court cited with approval the Seventh Circuit's decision in a similar case entitled PLAKAS v. DRINSKI, 19 F.3d 1143 (7th Cir. 1994). In that case, the Court rejected the argument of the plaintiff that police must exhaust all feasible alternatives before deadly force can justifiably be used. The Seventh Circuit held that the Fourth Amendment does not require officers to use the least intrusive or even less intrusive alternatives in search and seizure cases. Instead, the Court ruled that the only test is whether the police acted reasonably in what they actually did. The Eleventh Circuit specifically held that the officers in the MENUEL case would have acted irresponsibly if they had left the home and allowed the family to try and take care of the dangerous situation that had arisen. The Court also held that because there was no unconstitutional conduct on the part of involved officers, there could not be any liability for the City for inadequate training.

E) CARTER v. BUSCHER, 972 F.2d 1328 (7th Cir. 1992)

CARTER's husband, RAYMOND RUHL, was shot and killed when Illinois State Police Officers tried to arrest him for conspiracy to have CARTER murdered. RUHL, an Illinois Department of Corrections (DOC) officer, ran a legal gun selling business out of his home. He bragged that he was always armed, even while working inside the prison. In an attempt to minimize risk of a violent confrontation, State Police officers devised a plan to

arrest him away from home and work. On January 15, 1988, three state troopers and two DOC officers put into operation their arrest plan for RUHL. BUSCHER, the Assistant Warden of the facility that RUHL worked in, asked RUHL if he could assist his niece because she had broken down on a nearby highway. RUHL agreed and drove to the location. A female trooper posed as the Assistant Warden's niece and two male troopers posed as her friends. They hoped that RUHL would leave his car and approach the apparently disabled vehicle. BYERS, the female trooper, walked back to talk to RUHL when he did not exit his car. She tried to persuade him to look at her engine without success. Trooper BENSYL then approached RUHL, shined a flashlight into RUHL's eyes and announced, "state police". RUHL responded with gunfire from a semi-automatic weapon. BENSYL was immediately shot and killed. Trooper BYERS began to fire at RUHL through the rear window of the car and Trooper McLEARIN rushed toward RUHL's location. RUHL fired at him, wounded him, and he fell to the ground. RUHL exited his car and fired at BYERS and she fired her last round in return. Suddenly, the DOC officers arrived and one fired a shotgun blast at RUHL. RUHL was mortally wounded with this round.

Two years later, CARTER, the intended victim, filed a Title 42 U.S.C. Sec. 1983 action against the surviving State Police officers, the DOC officers and the estate of the dead Trooper. CARTER claimed that the Defendants, by devising an ill conceived plan to arrest RUHL on a public highway in the dark, instead of inside the prison where he worked, created a situation in which unreasonable deadly force was used. She alleged that this failure to devise an appropriate arrest plan violated the Fourth Amendment rights of her deceased husband. The defendants argued that there had been no violation of the Fourth Amendment and in the alternative, they were entitled to dismissal on Qualified Immunity grounds. The District Court ruled in favor of the police and the Seventh Circuit affirmed.

At the outset, the Court observed that CARTER was not arguing that the police conduct at the moment the shootout began or thereafter was excessive or unreasonable. Instead, she argued that the Fourth Amendment prohibits the creation of a reasonably foreseeable dangerous situation in which to arrest a suspect. The Court rejected this contention and stated, "Contrary to CARTER's contention, GARNER and BROWER [Supreme Court cases relating to deadly force] do not suggest that the Fourth Amendment prohibits creating unreasonably dangerous circumstances in which to affect a legal arrest of a suspect." The Court, citing Supreme Court precedent, determined that no Fourth Amendment seizure of RUHL occurred until he was shot by the DOC officer. Because the arrest plan preceded the seizure of RUHL, it cannot

have any bearing on the outcome of the Fourth Amendment analysis. The Fourth Amendment, the foundation of the lawsuit, was not implicated until the moment that RUHL was shot. The Court explained that "[S]hooting RUHL, then constitutes the only seizure we must scrutinize under the Fourth Amendment." The Court asked whether the shooting was reasonable under the Fourth Amendment and answered, "We need not linger long on this question. RUHL's shooting rampage threatened the lives of all the officers at the scene. Therefore, the rule in GARNER unquestionably justified the use of deadly force to seize RUHL." The Court concluded by stating, "Even if the defendants concocted a dubious scheme to bring about RUHL's arrest, it is the arrest itself and not the scheme that must be scrutinized for reasonableness under the Fourth Amendment."

Notwithstanding the above, agents and police officers should take great care in devising the arrest plan for potentially dangerous persons. Failure to do so can result in death or serious harm to officers and citizens in the vicinity.

F) FRAIRE v. CITY OF ARLINGTON, 957 F.2nd 1268 (5th Cir. 1992).

Officer LOWERY, Arlington, Texas Police Department, was driving in an unmarked police car in plain clothes when he noticed a pickup truck enter the road in front of him with an extremely wide turn. The pickup nearly collided with oncoming traffic and LOWERY noticed that both the driver and passenger had open cans of beer in their hands. FRAIRE, the driver of the pickup made a sudden right turn onto a residential street and parked in the driveway of a home on the side street. LOWERY approached the pickup on foot, identified himself as a police officer, and displayed his badge (plaintiffs dispute that LOWERY properly identified himself and displayed his badge at any time during this incident).

LOWERY instructed FRAIRE to shut off the engine but was ignored. Instead, FRAIRE put the truck in reverse and backed out of the driveway. FRAIRE sped down the side street and drove further into the residential neighborhood. LOWERY followed at a slow speed. LOWERY observed FRAIRE in the distance as he approached a turn at the bottom of a hill. FRAIRE was unable to make the turn because of his excessive speed. He slammed the truck into the curb and drove onto a person's lawn. FRAIRE once again placed the truck into reverse and nearly rammed the police car as he drove away. FRAIRE turned into a cul-de-sac and skidded to a stop at the curb at the end of the cul-de-sac. LOWERY followed and came to a stop about 30 feet from the truck. LOWERY left his car and again approached the truck. He identi-

fied himself as a police officer and held up his badge so it was visible. FRAIRE attempted to drive around the cul-de-sac and LOWERY stood in the street near where his police car was parked. He yelled, "Stop police officer". Several witnesses testified that LOWERY yelled "Stop police" several times as FRAIRE drove the pickup in his direction. They stated that the truck headed straight for LOWERY and they believed that he was going to be run over. They advised that LOWERY waited until the last possible moment before firing one shot into the truck. LOWERY stated that after he fired, he jumped to his left, expecting to be hit by the truck. He did not realize that his bullet hit FRAIRE until FRAIRE failed to exit the vehicle after it came to rest on the front lawn of a house. FRAIRE later died of his wound and his survivors filed a Title 42 U.S.C. Sec. 1983 action against LOWERY and the City of Arlington.

The lawsuit alleged that LOWERY deprived FRAIRE of his constitutional rights by using deadly force in violation of the Fourth Amendment. The suit also claimed that the City failed to implement deadly force policies and procedures which deprived FRAIRE of his constitutional rights. The District Court ruled in favor of LOWERY and the City and the Fifth Circuit affirmed.

Plaintiffs argued on appeal that LOWERY in effect created the circumstances making deadly force necessary because he failed to follow established police procedures in displaying his badge and identifying himself as a police officer while wearing plain clothes. The Court, in rejecting this argument, initially observed that LOWERY vigorously disputed this claim that he failed to properly identify himself. Next the Court examined its earlier decision in YOUNG v. CITY OF KILEEN, 775 F.2d 1349 (5th Cir. 1985) and observed that they had in that case reversed a ruling by the lower court finding excessive force was used because an officer had acted negligently and contrary to good police procedure with respect to events leading up to the use of deadly force. The Court observed that in YOUNG, it ruled that "YOUNG's movements gave the officer reason to believe, at that moment, (the moment just prior to the shooting) that there was a threat of physical harm." The Court explained that what is important in deadly force cases is what the officer is faced with at the moment when the shooting takes place and not what he may have done or failed to do during events leading up to the use of deadly force. The Court focused its attention upon what Officer LOWERY was facing at the moment of the shooting. The Court observed that "vehicles can be classified under certain circumstances as deadly weapons." The Court stated that "[A]t the moment of the shooting..." LOWERY was trying to prevent his own serious injury or death. The Court concluded that LOWERY was

justified in firing to prevent his own death or great bodily harm. The Court also rejected Plaintiff's claims against the City.

G) **REESE v. ANDERSON, 926 F.2d 494 (5th Cir. 1991)**

On June 14, 1989, a robbery occurred at a Waco, Texas convenience store. A responding Waco Police Officer, STEVE ANDERSON, spotted the getaway car and gave chase. Eventually, the getaway car spun out of control and came to rest with the passenger side directly in front of ANDERSON's patrol car. The four suspects remained inside and ANDERSON drew his handgun. He ordered the suspects to raise their hands. CRAWFORD, the front seat passenger, raised his hands and then lowered them below the window line. ANDERSON yelled at him to raise his hands and he immediately raised them. He lowered them again and raised them when ANDERSON yelled at him. CRAWFORD again reached down and leaned to his left. He leaned over and reached toward the floorboard. ANDERSON testified that he believed that CRAWFORD was reaching for a gun. ANDERSON was 10 feet away from CRAWFORD and when CRAWFORD sat up, he was shot and killed by ANDERSON.

CRAWFORD's mother sued Officer ANDERSON, the Waco Police Chief and the City of Waco under Title 42 U.S.C. Sec. 1983. She alleged unreasonable use of deadly force against ANDERSON and failure to train and supervise against the Police Chief and the City. The District Court refused to dismiss the case and the Fifth Circuit Court of Appeals reversed and ruled in favor of ANDERSON and the Police Chief. The Court refused to dismiss the case against the City because the City did not have the right to appeal prior to trial.

In ruling in favor of ANDERSON, the Court observed that under the circumstances of this case, a reasonable officer could well have been in fear for his safety and the safety of others nearby. The Court explained that, "ANDERSON had repeatedly warned CRAWFORD to raise his hands and was now faced with a situation in which another warning could...cost the life of ANDERSON or another officer."

The Court dismissed plaintiffs claim that use of deadly force was unnecessary because several officers had allegedly surrounded the suspect vehicle at the time of the shooting. The Court observed, "[H]ad CRAWFORD in fact retrieved a gun from beneath his seat, he could have caused injury or death despite the presence of numerous police officers."

Finally, the Court refused to find significance in the fact that CRAWFORD in fact was unarmed. The Court stated that

this fact was irrelevant because ANDERSON could not have known this and CRAWFORD's actions reasonably lead him to the conclusion that he faced imminent serious physical harm.

H) SMITH v. FRELAND, 954 F.2d 343 (6th Cir. 1992)

Officer SCHULCZ observed a car being operated by BRENT SMITH speed out of an apartment complex. The car ran a stop sign and SCHULCZ attempted to stop it. SMITH refused to yield and a chase followed. SMITH accelerated to speeds in excess of 90 miles per hour. He tried to run a pursuing police car off the road and finally pulled onto a dead-end street that was 15 to 20 feet wide. SMITH drove to the end of the street and tried to turn around on the lawn of a residence. SCHULCZ drove his car as close as possible to SMITH's car and exited the police vehicle. Suddenly, SMITH backed up and then sped forward ramming the police car. He backed up again and zoomed around the police car. He smashed into a nearby fence and gate as he did so. SMITH drove past SCHULCZ and the officer drew his handgun. He fired once and SMITH was struck by the bullet and killed. SMITH's mother filed a Title 42 U.S.C. Sec. 1983 action against SCHULCZ and his municipal employer and alleged that the use of deadly force in these circumstances was excessive and unreasonable. The District Court ruled in favor of the defendants and the Sixth Circuit Court of Appeals affirmed.

In upholding the officers' conduct, the Sixth Circuit observed that his use of deadly force must be judged by the principles outlined by the Supreme Court in GRAHAM v. CONNOR, 490 U.S. 386 (1989). The Court observed that in GRAHAM, the Supreme Court stated that the reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene of the incident rather than with 20/20 hindsight. Moreover, the Court explained that use of force cases must be examined in light of the fact that police officers are often forced to make split-second judgements in circumstances that are tense, uncertain and rapidly evolving. With this in mind, the Sixth Circuit observed that "[U]nder GRAHAM, we must avoid substituting our personal notions of proper police procedure for the instantaneous decision of the officer of the scene." (emphasis added)

In the instant case, plaintiff argued that the use of deadly force was unnecessary because other officers had blockaded the end of the dead end street and that her son's escape route had been blocked off. The Sixth Circuit disagreed and stated that Officer SCHULCZ could have reasonably believed that SMITH would be able to escape the roadblock. Moreover, the Court observed that, "[H]e posed a major threat to the officers manning

the roadblock. Even unarmed, he was not harmless; a car can be a deadly weapon." The Court also observed that SMITH represented a danger to neighbors on the street because he could have stopped and tried to take hostages.

Finally, the Court observed that the fact that SCHULCZ's actions violated local police policies regarding the use of deadly force did not require a different result. The Court stated "[T]he issue is whether he violated the Constitution, not whether he should be disciplined. City policies do not determine constitutional law."

I) GREENIDGE v. RUFFIN, 927 F.2d 789 (4th Cir. 1991)

On May 12, 1988, RUFFIN, a Baltimore, Maryland Vice-Squad Officer, observed a prostitute enter a man's car. RUFFIN and three other officers followed the car until it parked. The officers approached the car without flashlights even though it was dark. RUFFIN observed an illegal sex act in progress, opened the car door and identified herself as a police officer. She ordered the car's occupants to place their hands in full view but neither complied. She pointed her revolver at them and repeated the order. She saw GREENIDGE reach for a long cylindrical object from behind the seat which was thought was a shotgun. (It was in fact a wooden nightstick.) She fired at GREENIDGE and caused severe permanent injury. GREENIDGE sued RUFFIN, the Police Commissioner and the City pursuant to Title 42 U.S.C. Sec 1983 and alleged an unreasonable use of deadly force. The District Court permitted the case to go to the jury and the jury ruled in favor of RUFFIN and the other defendants.

The Fourth Circuit Court of Appeals affirmed and rejected GREENIDGE's contention that the District Court Judge erred in refusing to admit evidence showing that Officer RUFFIN failed to follow established police procedures during events leading up to the time immediately before the shooting. GREENIDGE had alleged that RUFFIN failed to employ proper backup before approaching the vehicle and failed to use a flashlight. The Court observed that in GRAHAM v. CONNOR, 490 U.S. 386 (1989), the Supreme Court "[S]eemed to have relied upon the 'split-second judgements' that were required to be made [by police officers in use of force situations] and focused on the reasonableness of the conduct 'at the moment' when the decision to use certain force was made." The Court explained that, "In light of...the Supreme Court's focus on the very moment when the officer makes 'split-second judgements', we are persuaded that events which occurred before Officer RUFFIN opened the car door and identified herself to the passengers are not probative of the reasonableness of

RUFFIN's decision to fire the shot." The Court found RUFFIN's use of force to be reasonable in this situation.

J) SLATTERY v. RIZZO, 939 F.2d 213 (4th Cir. 1991)

Officer RIZZO, Fairfax County, Virginia Police Department, was assigned to the Narcotics Enforcement Team (NET) which was scheduled to do a "reverse" undercover operation of the night of February 23, 1990. The operation was to take place at the BULL RUN GRILL (the Grill) which had a history of narcotics distribution and incidents involving weapons and violence in the past. Recent NET operations at the Grill had lead to the recovery of guns from drug suspects and a drive-by shooting had recently occurred there as well.

During the "reverse", Officer RIZZO approached a suspect vehicle in order to arrest SLATTERY. He was wearing a bullet-proof vest with the word "Police" written on it. He also wore an armband and a mask with the word "Police" written on them. His badge was clipped to the outside of his belt in plain view. He shined his flashlight on SLATTERY who was sitting in the front passenger seat. He could not see SLATTERY's hands. He identified himself as a police officer and ordered him to raise his hands at least twice. SLATTERY failed to respond and RIZZO kicked the car window. SLATTERY turned and looked at RIZZO and RIZZO yanked open the door. RIZZO yelled, "Police Officer, get your hands up now."

SLATTERY did not respond and RIZZO could see that SLATTERY's left hand appeared to be holding an object. SLATTERY turned his upper body toward RIZZO but failed to show his left hand. RIZZO shot SLATTERY once in the head. It was later determined that SLATTERY was holding a beer bottle in his hand.

SLATTERY recovered and filed suit claiming an inappropriate and unconstitutional use of deadly force suit under Title 42 U.S.C. Sec. 1983. The District Court refused to dismiss the suit against RIZZO and rejected his claim of qualified immunity. The Fourth Circuit Court of Appeals reversed. The Court stated that RIZZO is entitled to win on qualified immunity grounds without having to undergo a jury trial as long as a reasonable police officer would have had probable cause to believe that SLATTERY posed a serious threat of personal harm to him at the time he pulled the trigger. The Court believed on these facts that RIZZO did have probable case in this regard and stated, "[A] reasonable officer could have had probable cause to believe that the appellee [SLATTERY] posed a deadly threat...." The Court ruled as a matter of law that RIZZO's conduct was appropriate and that he was entitled to qualified immunity.

K) KRUEGER v. FUHR, 933 F.2d 1358 (8th Cir. 1993).

On June 6, 1989, Springfield, Missouri Police Officer DONALD FUHR was conducting routine patrol duty in his city during the early morning hours. Officer FUHR heard a radio transmission that an armed assault had occurred at a local laundry. Moreover, he learned that the suspect was a white male, who was wearing a black shirt with the number "12" on it, and blue jeans. He also learned from the radio transmission that the suspect was armed with a knife. A subsequent radio transmission indicated that the suspect's name was KRUEGER, and that he was possibly an escapee from a local half-way house. Officer FUHR heard another officer communicate the suspect's probable location, and the second officer stated that the suspect was supposed to be very high on drugs, and had some type of knife on him.

Shortly thereafter, Officer FUHR drove his police vehicle onto East Walnut Street in Springfield, Missouri, and observed an individual fitting the description of the suspect lying on his stomach between two parked cars. Officer FUHR left his police vehicle, drew his service revolver, identified himself as a police officer and ordered the suspect to freeze. At that time, LEROY KRUEGER did not have a knife in his hand, nor did Officer FUHR notice a knife anywhere on his person.

KRUEGER began to run, and the officer chased him for approximately 210 feet. Several times during the pursuit, the officer ordered KRUEGER to freeze without success. When the officer closed to within three to four yards from KRUEGER, he saw KRUEGER reach to the area of his right hip. He heard the sound of an object being pulled from KRUEGER's waistband area. The officer testified at his deposition that KRUEGER pulled a knife from his waistband, and was gripping it in his hand. FUHR further testified that he believed that KRUEGER was going to turn and attack him with the knife. The officer stated that he had been running as fast as he could and was fearful that he would not be able to stop in time, to avoid the attack. FUHR testified that he slowed down, leveled his service revolver and fired four rounds at the center mass of KRUEGER's body. Two rounds struck KRUEGER in the back, and a third round hit him in the base of the skull. KRUEGER died from the wound that hit him in the head. During the subsequent crime scene search, another police officer found a knife, with an exposed blade, located approximately 43 feet from the point where KRUEGER's right foot came to rest on the sidewalk.

KRUEGER's natural parents later filed a civil rights suit against Officer FUHR and the City of Springfield, Missouri, pursuant to Title 42, U.S.C., Section 1983. The suit alleged

that Officer FUHR violated their son's Fourth and Fourteenth Amendment rights by using excessive force when he shot and killed LEROY KRUEGER.

The District Court Judge refused to grant a dismissal of the action against Officer FUHR, and denied his Motion for Summary Judgement. Officer FUHR filed this appeal with the Eighth Circuit, which reversed the action of the District Court Judge, and ruled in favor of Officer FUHR. In reversing the District Court, the Court observed that the Supreme Court had articulated the constitutional standard for the use of deadly force in its decision TENNESSEE v. GARNER, 471 U.S. 1 (1985). The Eighth Circuit further observed that the use of deadly force is constitutionally reasonable in certain limited circumstances, and quoted language from the GARNER opinion, regarding the constitutional standard for use of deadly force, which is set forth as follows:

> "Thus, if the suspect threatens the officer with a weapon, or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given."

The Eighth Circuit noted that an officer's compliance with the constitutional standard on the use of deadly force must be assessed from the point of view of a reasonable officer on the scene of the incident, as required by the Supreme Court's decision in GRAHAM v. CONNOR, 490 U.S. 386 (1989). Using the constitutional standard for deadly force from GARNER and assessing the incident from the point of view of the reasonable officer on the scene, as required by GRAHAM, the Eighth Circuit concluded that Officer FUHR acted properly in using deadly force against KRUEGER. The Court explained that under the circumstances, it was objectively reasonable for Officer FUHR to believe that the individual he was chasing had committed a crime involving the infliction or threatened infliction of serious physical harm. Moreover, the Court pointed out that the officer knew that the suspect probably had a knife. The Court also stated that it was objectively reasonable for Officer FUHR to believe on the basis of this information, that he faced a serious and immediate danger of physical harm when KRUEGER pulled, or seemed to pull, a knife from his waistband. The Court concluded that the shooting of KRUEGER was a reasonable use of deadly force, even though he was shot in the back, and even though the knife that he allegedly had on his person was found 43 feet from his body, shortly after the

shooting. The Court also determined that the use of deadly force was necessary to prevent the escape of the suspect in this case. The Court observed that other police officers were in the general area where the chase was in progress and that it was possible that another officer might have apprehended KRUEGER if he had gotten away. However, the Court stated that the Fourth Amendment does not require police officers to forego the use of deadly force in order to prevent their own death or serious physical injury, just because there is a possibility that another officer might later apprehend the fleeing suspect.

Finally, the Court observed that GARNER requires an officer to give a warning, where feasible. The Court observed that Officer FUHR ordered KRUEGER to freeze when he encountered him lying between the two cars at the initiation of the chase. He also ordered him to freeze several times during the pursuit. The Court noted that there was no evidence that FUHR gave a warning immediately prior to the shooting, but the Court nonetheless believed that under the urgent circumstances facing Officer FUHR, the absence of a warning immediately preceding the shooting did not render his use of deadly force constitutionally unreasonable.

L) **ALEXANDER v. CITY OF SAN FRANCISCO, 29 F.3d 1355 (9th Cir. 1994)**

This civil action was brought by the executor of the estate of HENRY QUADE against the City of San Francisco and certain San Francisco police officers who shot and killed him when they forcibly entered his home in October 1990. The suit alleged that the individual defendants violated QUADE's Fourth Amendment rights by entering his home for the purpose of arresting him without the appropriate warrant and claimed that they used excessive force in the entry which initiated an escalation of force that resulted in QUADE's death. Moreover, the suit alleged that the City should likewise be liable for failure to train the officer in command of the operation. The District Court ruled in favor of the defendants. The Ninth Circuit reversed regarding the individual police defendants but affirmed the dismissal of the suit against the City. The Court remanded the case back to the lower court for trial regarding the individual police defendants.

In June 1990, the San Francisco Public Health Department (PHD) received a complaint that QUADE's basement had sewage seeping from it into the foundation of a neighbor's house and that a foul odor was coming from the house. PHD officials attempted to inspect the property but no one came to the door. They summoned QUADE to appear at a hearing on the matter on

several occasions with negative results. QUADE failed to respond to numerous letters sent to him by PHD officials and he likewise failed to respond to a letter advising him that an inspection warrant had been issued for his house. Finally, a forcible entry warrant was issued for the house which authorized entry for the purpose of discovering whether the house complied with City health codes. On October 16, 1990, PHD officials went to QUADE's house with Sergeant HELLER of the Police Department. Sergeant HELLER found the front door nailed shut and moved a piece of cardboard which covered the front window. QUADE responded by stating that he intended to get his gun and use it. The Sergeant called for assistance and a S.W.A.T. team, hostage negotiators and other police personnel arrived. The hostage negotiators learned that QUADE was mentally unstable, elderly and half-blind. They attempted to talk to QUADE for about an hour with negative results. Captain WILLETT then prepared a plan to enter and arrest QUADE. The S.W.A.T. team broke through the front door with a battering ram and seven of them entered. QUADE appeared at the top of the staircase holding a .22 caliber pistol. He was ordered to drop the gun but instead, he said, "I told you I was going to use it," and pulled the trigger. QUADE's gun misfired and several officers fired at him. He died from his wounds shortly after the incident was over.

After the incident concluded, Captain HETTRICH gave the following statement to the press: "It wasn't necessarily dangerous but we could have been waiting all day long. The man was just unresponsive to any of our demands... . [I]t appeared that he was not going to respond and we felt that rather than keep traffic blocked up and the streets blocked all day long, we would try and go in and arrest him."

Plaintiff argued on appeal to the Ninth Circuit that the police entered for the purpose of arresting QUADE and did not possess the appropriate warrant to justify the entry. Plaintiff claimed that an arrest warrant was required under the rationale of the Supreme Court's decision in PAYTON v. NEW YORK, 445 U.S. 573 (1980). In that case, the Supreme Court held that police officers need an arrest warrant before they can enter a person's own home to arrest them unless they receive valid consent or confront an emergency. Plaintiff asserted that the forcible entry warrant relied upon by the police, was not sufficient to justify entry when the police intended to arrest QUADE upon gaining entry. The Court agreed with plaintiff and observed that the forcible entry warrant justifies entry for administrative inspection purposes only and that if the police made a decision to arrest QUADE prior to the entry, an arrest warrant was needed rather than an administrative warrant. The Court also rejected the finding of the District Court Judge that the police faced

exigent circumstances here which obviated the need for an arrest warrant. The Court observed that Captain HETTRICH informed the press at the conclusion of the incident that the situation was not necessarily dangerous and that the decision to enter was based upon a wish not to keep traffic blocked up all day.

The Court concluded by stating that the purpose of entry by the police was in dispute and that the dispute had to be resolved by a jury. Moreover, the Court reasoned that if the jury decides that entry was for the purpose of assisting the City and inspecting the home, they could conclude that the force used was unreasonable. However, if the jury finds that entry was made for the purpose of arresting QUADE, they may conclude that the amount of force used was correct because police were faced with a man who had threatened to shoot anyone who entered. (The jury could still in the latter instance find for plaintiff because no arrest warrant was obtained.) The Court remanded the case back to the lower court for a trial.

This decision places the defendant police officers in a very difficult situation. If the jury concludes that entry was made to arrest QUADE, they will be instructed to find in favor of the plaintiff because the Court has already concluded that an arrest warrant was needed if that is the case. Conversely, if the jury finds that entry was made to assist the City in the inspection of the premises, they will also likely find for the plaintiff because the force used is likely to be considered excessive when compared with the more benign reason for entry.

Judge TROTT wrote a dissenting opinion in which he, among other things, thoroughly disagreed with the majority on the issue of exigent circumstances. He observed that QUADE's conduct amounted to "[A] classical and unmistakable situation involving exigent circumstances...." He explained that an armed encircled suspect is always dangerous and stated that people like QUADE frequently shoot from their homes at police and bystanders. He concluded that "[I]t is impossible to claim,...that...the Constitution of the United States required the police to withdraw when Mr. QUADE said he was arming himself and to secure an arrest warrant before they could go into his house to arrest him...."

Judge TROTT concluded that because the entry was lawful, "[T]he force they used when he pointed his gun at them was reasonable as a matter of law. The majority discounts the danger posed by an armed, urban, barricaded recluse threatening to shoot police and city inspectors. This claim is, with all due respect to my colleagues, monumentally mistaken... The situation was terribly precarious. We judges don't go out and serve warrants we order executed. We ask the police to do it for us.

Telling the police that this situation was not dangerous would be laughable if it were not so deadly serious."

M) COLE v. BONE, 993 F.2d 1328 (8th Cir. 1993)

This case arises from a high speed pursuit on Interstate 70 which ended in the death of DAVID COLE. On July 4, 1988, DAVID COLE and his brother, TODD, were traveling to Kentucky in an 18-wheel tractor-trailer. For reasons unknown, DAVID COLE drove the truck at a high speed through a toll booth in Bonner Springs, Kansas, without stopping to pay the toll. A Kansas State Trooper attempted to pull the truck over with negative results. DAVID COLE drove the truck recklessly as he approached Kansas City, Missouri, and Kansas City Police Officers began pursuing the truck once it crossed into the State of Missouri. Several Missouri State Highway Patrolmen became involved in the pursuit east of Kansas City. The Missouri Highway Patrolmen had received a radio report that the truck had traveled through Kansas City at speeds exceeding 90 mph and had passed traffic on both shoulders of Interstate 70. The radio report also said that the truck had attempted to ram several police cars. The Missouri Highway Patrolmen attempted to bring the truck to a halt by means of a "rolling roadblock". A "rolling roadblock" involves police cars boxing a suspect vehicle in and attempting to slow down until the suspect vehicle is forced to come to a full stop. This procedure failed, however, because according to the troopers, whenever they slowed down, the truck would accelerate.

After the failure of the rolling roadblock, one trooper attempted to stop the truck by firing a shotgun round into the trailer's wheels. Although one trailer tire was flattened, the truck continued to speed along on its remaining tires. The officer firing the shot was unable to fire again at the trailer's tires because every time he attempted to pull alongside the trailer, DAVID COLE would see him in the rear view mirror and swerve toward the officer's vehicle.

Corporal HOLT then ordered a stationary roadblock to be set up at road marker 44 on Interstate 70. Three troopers placed their vehicles in the passing lane in a fashion which was designed to funnel the truck into a single lane. This arrangement left an escape route for the truck in case COLE decided to run the roadblock. COLE ran the roadblock and did not slow down. As the truck sped past the roadblock, the troopers fired their shotguns at the tractor's tires and radiator. Although one tire was blown out, the truck continued speeding down the highway.

Throughout the pursuit, two troopers remained in front of the truck, which continued to travel at speeds exceeding 90 mph. Because holiday traffic remained congested, the troopers were constantly attempting to remove civilian traffic from the truck's pathway. One trooper attempted to keep COLE from hitting civilian traffic by pointing his shotgun in the direction of the tractor trailer on several occasions. Another trooper attempted to protect the civilian traffic by firing several shots at the truck in an attempt to disable it. One officer stated later that without these efforts, the truck would have struck the cars of the highway patrolman and civilian vehicles as well. The officers stated further that during the chase, COLE forced more than 100 cars off the road and endangered the lives of many other motorists.

After these attempts to halt the truck failed, Officer RICE decided to use deadly force. He placed himself in a position to get an unobstructed view of COLE driving the tractor-trailer. He then fired two rounds from his revolver at the truck and his second shot hit DAVID COLE in the forehead. COLE's brother then stopped the truck and DAVID COLE was transported to a Kansas City hospital where he died from the gunshot wound.

COLE's wife and children brought an action against the Missouri Highway Patrol Officers involved in the chase and included among the defendants was Officer RICE who had fired the fatal shot. The lawsuit was brought under Title 42 U.S.C. Sec. 1983, and it alleged that COLE's constitutional rights were violated because the police used excessive force in bringing an end to the truck pursuit.

The defendant police officers moved for a Summary Judgement Dismissal of the lawsuit and asserted that they were entitled to qualified immunity. The District Court Judge decided that the officers were not entitled to qualified immunity and the officers filed an immediate appeal with the Eighth Circuit Court of Appeals. The Eighth Circuit reversed the decision of the District Court and ruled in favor of the defendant police officers. The Eighth Circuit ruled that the defendant police officers were entitled to qualified immunity on the basis of the facts set forth above and granted their Motion for Summary Judgement.

At the outset, the Court observed that the Supreme Court in SIEGERT v. GILLEY, 111 S. Ct. 1789 (1991), announced that the threshold question in analyzing a qualified immunity claim is whether the plaintiff has alleged the violation of a constitutional right. The Eighth Circuit decided that plaintiffs' did assert an alleged violation of a constitutional

right because they alleged that the officers involved in the high speed pursuit unreasonably seized DAVID COLE in violation of the Fourth Amendment. The Court observed that the plaintiffs' claimed that DAVID COLE was seized during the pursuit when the troopers attempted the rolling roadblock and the stationary roadblock. The officers, on the other hand, argued that COLE was not seized until he was shot by Trooper RICE. The Court reviewed the Supreme Court's decision in CALIFORNIA v. HODARI D., 111 S. Ct. 1547 (1991), and observed that the Supreme Court held that no seizure occurs when police officers are chasing a suspect until the officers physically seize the suspect or until the suspect stops running in response to a command by the police to halt. The Court stated that pursuant to the Supreme Court decision in HODARI D., COLE was not seized until he was struck by the shot from Trooper RICE's revolver. The Court observed that the rolling roadblock, the stationary roadblock and the shots fired at the truck prior to the fatal shot, did not result in stopping the truck, therefore, there was no seizure of COLE until he was shot. Only then did the police attempts at stopping the truck succeed. The Court explained that "all of these actions constituted assertions of authority by the officers, but they were not seizures under the Fourth Amendment because COLE did not submit to any of them, nor did any succeed in stopping him."

Once the Court identified the time of seizure, it had to determine whether or not the shooting of COLE was reasonable in light of Supreme Court precedent. The Court examined the Supreme Court's decision in TENNESSEE v. GARNER, 471 U.S. 1 (1985), and observed that the Supreme Court stated that an officer may reasonably use deadly force when an officer has probable cause to believe that a person poses a threat of serious physical harm to the officer or others. The Court observed that the Supreme Court explained further that "if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given."

The Eighth Circuit also observed that use of force and deadly force cases involving police officers as defendants must be considered in light of the Supreme Court's decision in GRAHAM v. CONNOR, 490 U.S. 386 (1989), which held that in deciding whether or not police officers act with objective reasonableness in using force, courts must take into account the fact that "officers are often forced to make judgements in circumstances that are tense, uncertain, and rapidly evolving...."

In light of the above, the Eighth Circuit held that Trooper RICE's decision to use deadly force to disable the truck was not objectively unreasonable. The Court ruled that Officer RICE had probable cause to believe that the truck posed an imminent threat of serious physical harm to innocent motorists and police officers themselves. Moreover, the Court held that RICE had probable cause to believe that COLE had committed a serious crime because he had received a radio report that the truck had attempted to force several police cars off the road in Kansas City. Additionally, he believed that COLE had attempted to ram two Missouri Highway Patrol vehicles. The Court held that Trooper RICE's use of deadly force was constitutionally reasonable under Supreme Court precedent.

Interestingly, the Eighth Circuit also ruled that it did not need to determine whether Trooper RICE had violated Missouri Highway Patrol policy because "under Section 1983 the issue is whether the government official violated the Constitution or federal law, not whether he violated the policies of a state agency." The Court also observed that an argument could be made that Trooper RICE's decision to use deadly force might not have been the most prudent course of action but the Court responded to that argument by stating "the Constitution, however, requires only that the seizure be objectively reasonable, not that the officer pursue the most prudent course of conduct as judged by the 20/20 hindsight vision."

The Court also dismissed from the suit all of the Missouri Highway Patrol supervisors that were sued in this case for failure to properly train and supervise subordinates adequately. The Court decided that the supervisory personnel should be dismissed because, "We have found that plaintiffs have failed to establish that DAVID COLE's constitutional rights were violated." Therefore the Court held that they have no Section 1983 claim against the supervisory police officials because a critical element of any Section 1983 claim is establishing that a constitutional right has been violated.

N) HEGARTY v. SOMERSET COUNTY, ET AL, (No. 94-1473) (1st Cir. 1994)

On May 15, 1992, four campers arrived at their assigned campsite which was located about 200 yards beyond KATHERINE HEGARTY's cabin in Jackman, Maine. At about 9:00 p.m., HEGARTY saw the campers returning to their campsite and began yelling at them and accusing them of trespassing on her property. They tried to assure her that they were not on her property and had permission to use the campsite. They told her that they intended to leave in the morning and she responded "[O]nly if you make it

until morning." She picked up a rifle and fired several rounds in the direction of the campers. She fired approximately 30 rounds before finally giving them permission to leave. The campers left in two vehicles and were followed by HEGARTY until they reached the campground gate. She then turned her truck around and headed back in the direction of her cabin in the woods.

The campers drove to a nearby truck stop and called the Somerset County Sheriff's Department. Five officers were dispatched to the truck stop. They included Somerset County Deputies and a Maine State Trooper. The officers soon concluded that HEGARTY was their suspect. They knew that she was a "crack shot" and that she kept several powerful firearms in her cabin. They also knew that she had a history of emotional instability, alcohol abuse and two prior incidents involving physical assaults upon the Trooper. Trooper WRIGHT had arrested her for DWI in 1991 and she kicked and punched him at the time of the arrest and later came to his residence and assaulted him again. They decided that they needed to arrest her immediately without waiting to get a warrant and that they would not alert her of their intention to arrest until they had her restrained.

They parked their vehicles about a mile from her cabin and approached on foot. Concerned that she could be waiting on foot to ambush them, they brought a police dog with them to alert them in this regard. They approached the cabin at about 12:15 a.m. and saw her truck parked outside. The cabin was dark and loud music was heard coming from inside. The clearing around the cabin was plainly visible by moonlight. The officers walked up to the cabin and placed themselves along the outer walls. Officer GIROUX remained slightly away from the cabin. He identified himself and called her from the front of the cabin. He identified himself and called her by name. There was no response and Sgt. HINES pounded on the door and identified himself as a deputy. Again there was no response. Sgt. CRAWFORD shined a flashlight through a window at the cabin's rear and saw HEGARTY holding a rifle. She began to raise the rifle and he dove for cover. She asked him to identify himself and when he did, she left the bedroom and headed toward the front of the cabin. She had a dialogue with the officers, who told her that there had been some burglaries in the area and that they were concerned for her safety. She refused to come out and talk with them.

Officer GUAY was standing near a front window of the cabin and he saw her at the window. She told him that she could see him and at this point she was not holding a rifle. GUAY told officers posted at the front door and Sgt. HINES began an entry attempt which was momentarily delayed by a chain lock. Officer

GUAY saw HEGARTY pick up her rifle and raise it in the direction of the front door. The officers at the front door told her to drop it but she did not do so. She was fatally wounded by the officers at the front door.

Her survivor, JOHN HEGARTY, filed a civil suit against the officers under 42 U.S.C. Sec. 1983, alleging a violation of her Fourth and Fourteenth Amendment rights. The defendant officers asserted the defense of qualified immunity and moved for summary judgement. The District Court denied the motion and ruled that no objectively reasonable police officer could have believed that exigent circumstances were present on these facts so as to justify a warrantless entry into the cabin to arrest HEGARTY. The officers took an immediate appeal to the First Circuit which reversed and ruled that the constitutional portions of the complaint should be dismissed against the officers.

Prior to addressing the merits of the officers' assertion of the qualified immunity defense, the First Circuit explained the contours of the defense. The court explained that when police officers are sued for alleged violations of constitutional rights, they are immune from suit to the extent that their conduct did not violate clearly established rights of which a reasonable police officer would have known. The court explained further, that if a constitutional right was clearly established at the time of a police action, the officers will be held to know about the existence of the right whether they actually knew about it or not. Moreover, the defense will fail if a reasonable officer, placed in the same situation as the defendant officer, would realize that the kind of conduct engaged in by the actual defendant violated a clearly established right.

HEGARTY argued that it was clearly established at the time of this incident that an arrest warrant was needed to forcibly enter a person's home to arrest him/her unless the police had both probable cause and exigent circumstances. The court observed that this was a clearly established legal right and that the qualified immunity defense would offer the defendants no safe haven unless **an objectively reasonable officer, similarly situated, could have believed that the challenged police conduct did not violate HEGARTY's constitutional rights.** The court stated, **"Thus, the qualified immunity inquiry does not depend on whether the warrantless entry was constitutional, but allows...for the inevitable reality that 'law enforcement officials will in some cases reasonably but mistakenly conclude that their conduct is constitutional, and...that...those officials...should not be held personally liable."** (quoting, **ANDERSON v. CREIGHTON, 483 U.S. 635, 641 (1987).** (The court is making clear that an officer's conduct can fall short of a constitution-

al standard and still fall within the protection of the qualified immunity defense, as long as **an objectively reasonable officer, faced with the same situation, could reasonably believe that the course of action chosen by the defendant officers was reasonable**).

The court next examined whether an objectively reasonable officer could have believed that probable cause and exigent circumstances were present in the situation confronting the defendant officers in this case. First, the court concluded that the officers clearly had probable cause to believe that HEGARTY had committed the felony crime of reckless endangerment by shooting approximately 30 rifle bullets in the direction of the campers. Second, the court examined the defendants' claim that HEGARTY had engaged in dangerous conduct shortly before their arrival at her cabin and she posed an imminent and unpredictable threat to their safety and the safety of other campers in the area. Initially, the court observed that HEGARTY had indeed engaged in violent, life-threatening conduct against unarmed campers. Moreover, she had a history of emotional instability and had attacked and threatened one of the defendant officers in the past. Furthermore, prior to entry, the officers knew that she was armed with a rifle and was pointing it toward the front door as the entry was initiated.

However, the court observed that the plaintiff was not claiming that the officers used excessive force at the moment of entry when confronted by HEGARTY with raised rifle in hand. Rather, plaintiff, through an expert witness, claimed that the police made several tactical blunders prior to placing themselves in jeopardy by taking positions along the paper thin cabin walls. The expert claimed that the police failed to define or establish a proper chain of command before setting out to arrest HEGARTY. This caused the officers to act in an uncoordinated manner while at the cabin. The expert claimed that the officers did not follow acceptable rules of containment by immediately approaching the cabin and placing themselves in harms way. He claimed that the officers should have placed themselves in positions on the cabin's perimeter and then attempted to contact HEGARTY verbally from positions of relative safety, while at the same time radioing for assistance from the Maine State Police S.W.A.T. team.

The court rejected the expert's arguments and noted that the officers needed to quickly determine whether or not HEGARTY was inside the cabin. The court observed that when they first approached the cabin, her truck was outside but there were no lights on. Moreover, she was last seen by the shooting victims away from the cabin and the police knew that there were other campers in the area who could be at risk. They also knew

that she was very familiar with the area and could try to ambush them as they approached the cabin by waiting for them in the woods. This is why they brought a police dog with them to warn them of this possible situation. Thus, they needed to determine where she was in order to insure their own safety and the safety of others in the area. They had no way of conclusively establishing her whereabouts without approaching the cabin and making visual observation. The court noted that if they did not first place themselves along the cabin walls before seeking to communicate with her, and if she refused to answer them from a distance, they would have had to expose themselves to acute danger by approaching the cabin after alerting her to their presence from a distance.

The court observed that "[L]aw enforcement officers quite often are required to assess just such probabilities, and to weigh the attendant contingencies. And it is precisely such **spontaneous judgement calls - borne of necessity in rapidly evolving, life-endangering circumstances - that the qualified immunity doctrine was designed to insulate from judicial second guessing in civil actions from money damages... ."** The court went on to say, "Thus, we do not determine which of these strategies represented the more prudent course or posed the least serious risk to the suspect, the officers or others in the vicinity." The court observed that officers need not select the least intrusive means of handling an exigent situation as long as the means they selected to end the crisis were reasonable. The court ruled that the decision to approach the cabin to determine if HEGARTY was inside, was reasonable and concluded that "a competent police officer **reasonably could have believed that exigent circumstances warranted approaching the cabin walls - forthwith and unannounced... ."**

Finally, the court had to determine whether the officers situated outside the cabin walls could have reasonably believed that HEGARTY represented an imminent physical threat to their own safety. In this regard, the court observed that HEGARTY was able to move about freely in the unlighted interior of the cabin which contained deadly firearms. Moments before entry, she was seen by one officer holding a rifle which she pointed at him. Moreover, the officers realized that they were standing against paper thin walls which would not protect them from bullets fired in their direction. In addition, the officers could consider her past history of instability, her previous attacks against police officers and her irrational attack against innocent campers. Finally, the court noted that it was not safe for the police to leave the cover of the cabin walls and travel across an open field to the tree line. The court concluded that **"a competent police officer...reasonably could have believed both**

that there existed probable cause to arrest KATHERINE HEGARTY and exigent circumstances justifying immediate warrantless entry."

Although the result in this case might seem like a foregone conclusion to experienced law enforcement officers, it is very reassuring to know that the First Circuit is made up of some judges who recognize that officers are sometimes placed in situations of extreme danger to themselves and other citizens. In such circumstances, this court is saying that officers should be protected from later judicial and police "expert" second guessing. Government officials, police administrators and the media could also learn some lessons from this case as well.

o) SCHULZ v. LONG, ET AL, 44 F.3d 643 (8th Cir. 1995)

SCHULZ had been diagnosed a paranoid schizophrenic and had been hospitalized on several occasions for mental health treatment. One hospitalization involved an involuntary commitment. On July 17, 1986, SCHULZ began throwing, breaking, and sawing items in his basement bedroom, which was located in the home of his parents. The parents of SCHULZ were unable to convince him to go to the hospital for treatment, and they contacted a psychiatrist who had treated him in the past. The psychiatrist suggested that the police might have to be called for assistance in taking him to the hospital.

The parents contacted the police and Officer VANALSMICK, a St. Louis County police officer, was the first to arrive at the SCHULZ residence. Officer LONG was the second St. Louis County police officer to arrive at the scene. The parents furnished the officers with the information concerning the inappropriate conduct of their son, and told them about his past mental problems. The officers were invited into the home by the parents, and both went down the basement stairs. At the foot of the stairs, the officers discovered that SCHULZ had erected a chest-high barricade which consisted of tables, chairs, boxes and other items. Officer VANALSMICK began to speak with SCHULZ, who was on the other side of the barricade. Officer LONG stood on the stairs, just above the location of Officer VANALSMICK. Officer VANALSMICK tried to convince SCHULZ to accompany them to the hospital. After VANALSMICK talked with SCHULZ for approximately 15 minutes, Officer LONG went upstairs and requested the police dispatcher to send a supervisor to the location.

Shortly thereafter, SCHULZ retrieved a single-bladed hatchet from his bedroom area. After several requests from Officer VANALSMICK to put down the hatchet, SCHULZ finally set it down on a nearby shelf. Shortly thereafter, SCHULZ agreed to accompany the officers to the hospital, but told them that he had

to go back into his bedroom area to pack a few things for the trip to the hospital. As soon as he walked away from the barricade, Officer VANALSMICK grabbed the hatchet from the shelf and handed it to Officer LONG, who threw it up to the top of the stairs. SCHULZ saw this activity and became incensed. He began to throw bricks at the officers, and when he stopped, Officer VANALSMICK tried to get through the barricade to subdue him. However, the officer became entangled in the barricade. At that point, SCHULZ grabbed a long-handled, double-bladed ax and began approaching VANALSMICK at a very deliberate pace. He was holding the ax with both hands in a cocked position, with the blade at about head level. Officer VANALSMICK was still caught in the barricade and Officer LONG drew his weapon and warned SCHULZ twice to drop the ax or be shot. When SCHULZ got within six to eight feet from Officer VANALSMICK, Officer LONG began to fire at him. SCHULZ continued to approach VANALSMICK, until Officer LONG's fourth shot felled him. He ended up about three to five feet away from Officer VANALSMICK, who was still trying to disengage from the barricade.

SCHULZ recovered from the shooting and commenced a 42 U.S.C. Sec. 1983 action against the officers involved and against St. Louis County, Missouri. He alleged that the officers used excessive force against him and that St. Louis County should be liable for failure to properly train the officers who were involved. Prior to trial, the trial judge dismissed the lawsuit against Officer VANALSMICK and against St. Louis County, and a jury returned a verdict in favor of Officer LONG. SCHULZ filed an appeal with the Eighth Circuit Court of Appeals.

On appeal, SCHULZ argued that the District Court Judge was in error when he excluded evidence offered by SCHULZ that the police officers involved had essentially created the need for the use of force. He argued that they should have reacted to the situation confronting them differently, and suggested that they should have waited for a supervisor or a S.W.A.T. team. Furthermore, he argued that they should have used deadly force only as a last resort. The Eighth Circuit rejected SCHULZ's claim. Initially the court ruled that no Fourth Amendment seizure of SCHULZ took place until Officer LONG fired his weapon at SCHULZ and hit him. The court next observed that SCHULZ was arguing that certain actions and omissions by the officers which preceded the seizure were relevant to his claim regarding the excessive use of force. The court rejected this contention and stated that this argument was foreclosed by Supreme Court case law which is set forth in the case of GRAHAM v. CONNOR, 490 U.S. 386 (1989). In GRAHAM, the Supreme Court ruled that with respect to excessive force claims, the standard of reasonableness at the moment the force is used is the correct standard. Moreover, the Court

stated that "[T]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgements in circumstances that are tense, uncertain, and rapidly evolving, about the amount of force that is necessary in a particular situation." The Eighth Circuit observed that the Supreme Court's use of the phrases "at the moment" and "split-second judgement" are strong indica that the reasonableness inquiry should include only those facts known to the officer at the precise moment that the officer seizes the person injured. The Eighth Circuit ruled that evidence that the officers created the need to use force by their actions and omissions prior to the moment of seizure was irrelevant to the issue of whether or not excessive force was used. The court explained that the judicial inquiry should focus "[N]ot on what the most prudent course of action may have been or whether there were other alternatives available, but instead whether the seizure actually effectuated falls within a range of conduct which is objectively 'reasonable' under the Fourth Amendment. Alternative measures which 20/20 hindsight revealed to be less intrusive (or more prudent), such as waiting for a supervisor or the S.W.A.T. team, are simply not relevant to the reasonableness inquiry."

The Eighth Circuit also rejected the failure to train argument that SCHULZ made against St. Louis County because the court stated that the rule of law in the Eighth Circuit was that a municipality cannot be held liable on a failure to train theory unless an underlying constitutional violation is found regarding the alleged excessive use of force. Because the court concluded that there was no underlying violation of the Constitution with respect to the use of force, the court decided that there could be no liability for the county for failure to train.

P) ST. HILAIRE v. CITY OF LACONIA, ET AL (NO. 95-1463)

On December 1, 1995, the First Circuit Court of Appeals decided St. Hilaire v. City of Laconia, Et Al, (No. 95-1463). Officers from the Belknap, New Hampshire, Sheriff's Office, the Belknap Police Department, and the Laconia Police Department obtained a search warrant for the person of PHILIP ST. HILAIRE and his place of business, Laconia Auto Wrecking, to look for cocaine. Prior to the planned searches police knew that ST. HILAIRE carried a .357 caliber revolver and a .25 caliber semi-automatic pistol and that he had a shotgun and a crossbow at the place of business. Police also had information that he had recently pointed a gun at a person's head and had received reports, sometime earlier, of gunfire coming from the auto yard.

Officers planned to search ST. HILAIRE inside his business and then search the building. A sergeant in uniform was instructed to lead because ST. HILAIRE knew him from prior encounters. Several other officers participating in the operation were in plain clothes. Upon arrival, the officers observed ST. HILAIRE leave the building and head toward his car. Detective GUNTER, who was not in uniform, ran toward ST. HILAIRE who had already entered his car and turned on the engine. GUNTER drew his handgun and pointed it at ST. HILAIRE. ST. HILAIRE saw GUNTER and reached for his own weapon. GUNTER fired and hit him in the neck. ST. HILAIRE was paralyzed from the neck down and later died. Another officer looked inside the car and saw that ST. HILAIRE had his hand on a gun. Officers removed the gun from his hand.

ST. HILAIRE asked the officer who removed the gun from his hand why the officer who shot him failed to identify himself. Later, at the hospital, he told a nurse repeatedly that the officer "didn't identify himself." Police offices disputed this claim, and Detective GUNTER testified at deposition that he yelled "Phil, police, Phil," and then yelled "hold it." GUNTER also said that he held his badge in his extended left hand as he approached the car. Other officers supported GUNTER's claims.

ST. HILAIRE's wife sued under Title 42, U.S.C., Section 1983. She alleged the defendants had violated the Fourth Amendment by using excessive force in executing a search warrant because they failed to properly identify themselves and shot ST. HILAIRE when he failed to yield. The District Court dismissed the suit on qualified immunity grounds. The District Court ruled that events which take place prior to a shooting are not relevant to the Fourth Amendment inquiry because they occur prior to a "seizure" taking place. (The seizure occurs when the officer's bullet hits the suspect.) The District Court analysis was grounded upon the law from other federal circuits. For example, in Drewitt v. Pratt, 999 F. 2d 774 (1993), the Fourth Circuit held that in deadly force cases it is necessary to look only at whether it was objectively reasonable for an officer to shoot in the circumstances which existed at the moment of the shooting. Using this analysis, the District Court refused to examine events leading up to the shooting (including the identification dispute) and decided that the officer's decision to shoot was reasonable at the moment it was made.

The Court of Appeals affirmed but rejected the District Court's rationale. The court initially explained the parameters of the qualified immunity defense. The court explained that "(f)or purposes of determining qualified immunity the officer's

actions are measured by a standard of 'objective legal reasonableness... in light of the legal rules that were clearly established at the time [they] were taken'." (quoting Anderson v. Creighton, 483 U.S. 635, 639 (1987)).

Next, the court rejected the District Court's analysis that a police officer's actions need to be examined for reasonableness under clearly established law only at the moment of the shooting. The court ruled that all of the actions of an officer which lead up to the shooting can be examined to determine whether he/she has followed clearly established legal principles.

Accordingly, the court examined ST. HILAIRE's claim that the officer failed to identify himself prior to shooting her husband. She argued that the Fourth Amendment requires such identification in executing a search warrant. The court observed that it was not until the Supreme Court decided Wilson v. Arkansas, 115 S. Ct. 1914, in 1995 that it became clearly established that police officers were constitutionally required to announce their identity, authority, and purpose before entering a dwelling to search it. The court ruled that since the shooting in this case occurred well before the identification requirement became clearly established, the officers were entitled to qualified immunity even if the did not properly identify themselves.

(II) DEADLY FORCE AND THE "SEIZURE" REQUIREMENT

A. BROWER v. COUNTY OF INYO ET AL, 489 U.S. 593 (1989)

On the night of October 23, 1984, BROWER was killed when the stolen car that he had been driving in crashed into a police roadblock. Prior to the crash, BROWER drove at high speeds for approximately 20 miles in an effort to elude pursuing police. His heirs brought a lawsuit in the Federal District Court under Title 42 U.S.C. Section 1983, and claimed that the defendants used excessive, unreasonable and unnecessary physical force in establishing the roadblock and that this action resulted in an unreasonable seizure of BROWER in violation of the Fourth Amendment. Moreover, they alleged that the defendants caused an 18-wheel tractor trailer to be placed across both lanes of a two lane highway in the path of BROWER's flight. Further, they alleged that the defendants effectively concealed the roadblock by placing it behind a curve and leaving it unilluminated. Furthermore, they alleged that the defendants placed a police car, with its headlights on, between BROWER's oncoming vehicle and the tractor trailer so that BROWER would be blinded on his approach. The Federal District Court Judge dismissed the lawsuit with a finding that the roadblock had not been unreasonably established in light of the facts. The Ninth Circuit Court of Appeals affirmed the dismissal of the Fourth Amendment claim on the ground that no seizure had occurred.

The United States Supreme Court accepted the case for review and reversed. The Court focused its attention on the decision of the Court of Appeals which held that no seizure had occurred when the police used the roadblock to stop BROWER. The Court observed that in TENNESSEE v. GARNER, 471 U.S. 1 (1985), it held unanimously that a police officer's fatal shooting of a fleeing suspect constituted a Fourth Amendment seizure.

Therefore, when a police officer intentionally fires his weapon at a suspect and hits the suspect, a Fourth Amendment seizure occurs. Similarly, the Court reasoned that when police officers intentionally set up a roadblock for the purpose of stopping a fleeing felon and the fleeing felon is, in fact, stopped by the roadblock, a seizure likewise occurs. The Court explained that a seizure occurs whenever there is a governmental termination of freedom of movement through means intentionally applied. The Court explained further, "We think it enough for a seizure that a person be stopped by the very instrumentality set in motion or put in place in order to achieve that result. It was enough here, therefore, that, according to the allegations of the complaint, BROWER was meant to be stopped by the physical obstacle of the roadblock - and that he was so stopped." The Court offered the following hypothetical in order to further explain its position on the matter of seizure. The Court observed that no seizure would occur during a police high speed chase of a suspect vehicle, where the suspect vehicle refused to stop for police red lights and sirens, and subsequently goes out of control and crashes due to the bad driving habits of the suspect. Conversely, a seizure would occur if a police cruiser had pulled alongside the fleeing suspect vehicle and intentionally hit it, producing a crash which results in the suspect vehicle being stopped. The latter instance would involve a police seizure of the suspect while the former instance would not.

The Court remanded the case back to the lower Federal courts for a determination of whether or not the roadblock as set up in this case was unreasonable under the Fourth Amendment. On remand, the lower Federal courts will most likely look to the circumstances surrounding the setting up of the roadblock, including the location of the roadblock, the time of day or night, how well illuminated the roadblock was, and whether or not the suspect was given sufficient opportunity to stop of his own accord before crashing into the roadblock. The Court would also look into the allegation that lights were deliberately shined into his eyes to cause him to be blinded. Obviously, a well lighted roadblock on a straight interstate road would likely be much more reasonable than a roadblock set up around a curve in the road that was located in total darkness.